(1)

88-543

Supreme Court, U.S.
FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JEAN LEONARD HARRIS, Petitioner

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT COUNTY OF SAN DIEGO, RONALD HERPOLSHEIMER, JAMES LORENZ AND MYRON KLARFELD, Respondents

PETITION FOR WRIT OF CERTIORARI

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JEAN LEONARD HARRIS, Pro Se
16776 Bernardo Center Dr. Suite 110B
San Diego, California 92128
(619)485 1177

11 3pp

QUESTIONS PRESENTED

I.

DOES A FINDING OF PROBABLE CAUSE AT THE EXCLUSIONARY RULE STAGE OF PROCEEDING VACATE A PREVIOUS FINDING THAT DEFENDANTS CONDUCT WAS WITHOUT PROBABLE CAUSE SO AS TO PRECLUDE A 1983 ACTION BASED UPON THAT UNCONSTITUTIONAL CONDUCT?

Petitioner asks this court to determine that a finding of probable cause pursuant to the application of the federal exclusionary rule does not vacate a previous finding that defendant's conduct was an unconstitutional invasion of Petitioner's right of privacy. Petitioner asks this court to reaffirm that the exclusionary rule probable cause finding, to exclude or introduce evidence at trial, is a separate issue from that of defendant's conduct violating Fourth Amendment rights. United States v Leon, 468 U.S. 897, 82 L.Ed.2d 677, 688 (1984).

II.

WHERE THE STATE COURT FOUND PROBABLE CAUSE WHEN APPLYING THE FEDERAL EXCLUSIONARY RULE, WHAT IS THE SCOPE OF THE PRECLUSIVE EFFECT OF THAT FINDING ON A SUBSEQUENT 1983 CIVIL RIGHTS ACTION BASED UPON DEFENDANT'S CONDUCT ?

Petitioner asks this court to determine the scope of collateral estoppel as that doctrine might be used to preclude a 1983 action. This question has not been addressed by this court. The 1983 action is supported by a preliminary hearing order traversing a search warrant. Then the Municipal Court went on to find probable cause within the context of the federal exclusionary rule. See Haring v Prosise, 462 U.S. 306, 76 L.Ed.2d 595 (1983), n. 2. The Municipal Court considered the federal exclusionary rule only as to two of three counts thereby making two decisions. Does the scope of collateral estoppel prevent

petitioner from basing a 1983 action on the court's decision on the third count?

Does the scope of a finding of probable cause, on the exclusion issue, also negate the prior order traversing the warrant; does the probable cause finding, when made only as to counts one and two of three counts, negate petitioner's right to go forward in this 1983 action based upon the findings of no probable cause for defendant's conduct clearly made as to count 3; would the scope also preclude petitioner from going forward with other causes fairly addressed, such as a denial of due process as a result of respondent's abuse of the warrant procedure to resolve a civil dispute, [Motes v Myers, 810 F.2d 1055, 1060 (1987), or as a result of failing to give petitioner a fair and impartial investigation. People v Geer, 10 Cal.3d 255 (1977).

III.

COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED WHEN PRECLUDING CIVIL RIGHTS CLAIMS WOULD BE INEQUITABLE

Collateral estoppel is an equitable defense with limited application. To apply the doctrine too broadly, and as a result of an erroneous Municipal Court ruling, would create inequity where equity is the goal. Unless the issue is identical, and narrowly defined because of important constitutional issues, it should not preclude a 1983 action.

IV.

ATTORNEY FEES MAY NOT BE AWARDED SIMPLY BECAUSE THE COURT DETERMINES THAT THE APPEAL IS WITHOUT MERIT

An appeal that is simply without merit is not by definition "frivolous" and should not incur the chilling effect of an attorney fee award. If there is any legal point arguable on its merits, attorney fees should not be awarded the

defendant in a 1983 action- especially when the defendant is the violator of constitutional protection and succeeds merely on a procedural defense rather than a defense on the merits.

PARTIES TO THE PROCEEDING BELOW

Deputy District Attorneys Anthony Samson and Duane Shinnick, District Attorney Investigator Harold Waight and the County of San Diego, represented by County Counsel for the County of San Diego, Deputy Paul N. Bruce, 1600 Pacific Highway, Room 235, San Diego, California, 92101-2467.

James Lorenz, esq., and Ronald Herpolsheimer, represented by Findley, Kumble et al., now dissolved and known as Lorenz, Alhadeff and Lundin, Suite 1500, 101 West Broadway, San Diego, California, 92101.

Myron Klarfeld, esq., represented by Gregory Post, Suite 1400, 701 B Street, San Diego, California, 92101.

TABLE OF CONTENTS

Opinions Below.....1

Jurisdiction.....1

Constitutional /Statutory Provisions Involved.....1

Statement of Case. 2

Reasons For Allowance of Writ.....4

Conclusion.....22

Appendix.....25

TABLE OF AUTHORITIES

Allen v McCurry,
449 US 90(1980).....16,20,23

Bailey v Andrews,
811 F.2d 366 (7th Cir 1987)....24

Bernard v B of A,
19 Cal.2d 807 (1942).....26

Brubaker v King,
505 F.2d 534 (7th Cir. 1974)...24

Cristiansburg v EEOC,
434 U.S. 412 (1983).....32,36

DeCou v Howell,
190 Cal. 741.....15,16

Flaherty v Flaherty,

31 Cal.3d 637 (1988).....35

Gray v Bell,

712 F.2d 490 (D.C. Cir 1983)...25

Haring v Prosise,

462 US 306 (1983).....16,29

Hughs v Rowe,

449 U.S. 5 (1980).....36

Illinois v Gates,

462 US 213 (1983).....12

In re Lance,

37 Cal.3d 873 (1985).....15

Lasch v Bor. of Parkesburg,

736 F.2d 903 (3rd Cir 1984)....22

Motes v Myers,

810 F.2d 1055 (11th Cir.1987)..21

People v Costello,

245 Cal.Rptr. 804 (1988).....29

People v Geer,

19 Cal.3d 255 (1977).....22

People v Kurland,

28 Cal.3d 376 (1980).....4

People v Taylor,

12 Cal.3d 686 (1974).....27,28

Rice v Arden Farms,

199 Cal.App.2d 349.....15

Sandoval v Superior Crt,

140 Cal.App.3d 932 (1983).....28

Shah v County of L.A.,

797 F.2d 743 (9th Cir 1986)....22

Teitelbaum v Dominion,

58 Cal.2d 601 (1962).....26

U.S. v International Building Co.,

345 US 502 (1953).....20

United States v Leon,

468 US 897 (1984)..8,11,13,18,29,37

Whitley v Seibel,

676 F.2d 245 (7th Cir.1982)....24

Yarrow v State of Calif,

53 Cal.2d 427 15

Codes:

Cal.Code Civ.Pro. sect 128.5.....19

Cal. Penal Code sect. 118a.....11

Cal. Penal Code sect. 1538.5.....10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set forth at Appendix A. The judgment was affirmed June 15, 1988 after rejection of petitioner's request for rehearing en banc. See Appendix A

JURISDICTION

The grounds of which the jurisdiction of the Court is invoked under 28 USC 1254(1).

The nature of the proceeding below was a 1983 Civil Rights action wherein a summary judgment was granted in favor of defendants, affirmed on appeal to the Ninth Circuit.

The judgment petitioner seeks to have reviewed is a Memorandum opinion of the Ninth Circuit Court of Appeals, filed January 25, 1988. An order denying rehearing was made April 7, 1988, filed May 31, 1988 and judgment affirmed June

15, 1988. A copy of the Memorandum opinion and the order denying rehearing are included at Appendix "A".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provisions involved in this action include 42 USC 1983. Constitutional provisions include the Fourth and Fourteenth Amendment to the Constitution of the United States. The gravamen of the complaint is that (1) respondents violated petitioner's right of privacy by entering his office and home under a search warrant issued without probable cause, and (2) that respondents denied petitioner due process under the law by abusing the process of the court in having the warrant issued to settle a personal dispute and, further, denying petitioner a fair and impartial investigation.

STATEMENT OF THE CASE

The complaint at issue is a civil rights action under 42 USC 1983. The allegations of the complaint embrace right of privacy and due process. See appendix "B". The record reveals that petitioner was falsely accused of criminal conduct (offering a parcel of land in a subdivision without a public report required under California law) within an affidavit in support of search warrant. This was the only allegation within the search warrant and affidavit supporting probable cause. See Appendix "C", RT p.296/10, 307/8. At the preliminary hearing, the witness within the affidavit denied petitioners involvement in any criminal conduct (RT p.285/23, 286/23, 287/7, 287/24, 284/8, 284/24) and, further, it was discovered by the magistrate that material evidence was withheld from the magistrate going to

bias of the witness and the district attorney's office. The witness was actually an employee of an attorney with civil claims pending against petitioner. (App."C" RT p.317-319) The attorney was also the former head of the district attorney division issuing the warrant and there was no evidence that any of the allegations against petitioner were investigated by the district attorney prior to issuance.

Based upon the above evidence, the Municipal Court, at the preliminary hearing, entered an order traversing the search warrant. App. "C" RT 317-319. Motion to reconsider was denied. (App."C" RT p.466 et seq) The court found the district attorney office conduct "reckless" at that term is used in People v Kurland, 28 Cal.3d 376 (1980), tantamount to lying. App."C" RT p317-319

Thereafter, the Municipal Court

considered the federal exclusionary rule as to two of the three counts. Two of the counts were determined to fall within the period of California Proposition 8- requiring the application of the federal exclusionary rule. App."C" RT 466. Upon application of the federal exclusionary rule, the Municipal Court reaffirmed its finding that the conduct of respondents was reckless as that term is used in Kurland. App."C" RT 466. Then the court erroneously found that by adding in all of the material omissions, but not extracting the fabrication (the court had previously determined and the district attorney admitted that the only probable cause statement within the affidavit was the fabricated statement of the witness) that there was probable cause, as to the retest process, and allowed evidence to be admitted as to two of the three counts. App."C" RT p.466 et seq

As to the third count, the Municipal Court did not apply the federal exclusionary rule and excluded evidence. Thus, the Municipal Court made two decisions- one as to counts one and two and another as to count three.

Petitioner entered a plea to a misdemeanor count of the third count and the first two counts- those to which the federal exclusionary rule was applied- were dismissed.

Motion to Dismiss this 1983 complaint was denied by the District Court but Motion for Summary Judgment was granted on the grounds (1) petitioner is estopped to allege a civil rights violation because the trial court did not rule in petitioners favor on the issue and appellant entered a plea waiving appeal rights, (2) district attorney respondents are absolutely immune regarding their activities in issuing the

search warrant, (3) the civilian respondents were not the proximate cause of the civil rights violation, did not act under color of state law and did not conspire as alleged. See Appendix "D"

The United States Court of Appeals for the Ninth Circuit denied petitioner's appeal on the grounds that petitioner is estopped because the Municipal Court already ruled that the search and seizure in question did not violate petitioner's federal constitutional rights. See Appendix "A"

REASONS FOR ALLOWANCE OF THE WRIT

This Ninth Circuit decision differs from the prior decisions of the Seventh Circuit uniformly refusing to apply collateral estoppel within the context presented herein. In addition, this court has previously stated that the federal exclusionary rule is a rule separate from the issue of police

conduct. U.S. v Leon, 468 U.S. 897. The context presented differs from that of Leon. The application of this principle requires review. Petitioner suggests that the conduct is the true state of facts upon which the 1983 action should be supported and not affected by the fiction created when applying the exclusionary rule by adding back omissions or overlooking the unconstitutional invasion.

Question II, the scope of the preclusive effect of a prior probable cause finding, presents a question as yet not reviewed by this court. There is a differing view between the Seventh Circuit (no preclusion) and the Ninth Circuit herein.

The Third question presented herein is an important question in civil procedure dealing with 1983 civil rights cases. Collateral estoppel should be

narrowly applied when dealing with civil rights issues.

In awarding attorney fees to the defendants herein, the Ninth Circuit has departed from prior decisions of this court. The departure is great when faced with the important questions raised by petitioner and the unsettled issues of law between the Seventh and Ninth Circuit herein.

DISCUSSION

I.

DOES A FINDING OF PROBABLE CAUSE AT THE EXCLUSIONARY RULE STAGE OF PROCEEDING VACATE A PREVIOUS FINDING THAT DEFENDANT'S CONDUCT WAS WITHOUT PROBABLE CAUSE SO AS TO PRECLUDE A 1983 ACTION BASED UPON THAT UNCONSTITUTIONAL CONDUCT?

Petitioner asks this court to determine that a finding of probable cause pursuant to the application of the

federal exclusionary rule does not vacate the previously found unconstitutional invasion of petitioners right of privacy. Stated another way, the unconstitutional conduct of defendants is not made constitutionally lawful merely because the trial court found probable cause when applying the federal exclusionary rule.

Within the memorandum decision of the Ninth Circuit, the court stated, "Harris litigated precisely this Fourth amendment issue before the Municipal Court in the context of his motions to suppress evidence and to traverse the search warrants. In ruling on these motions, the Municipal Court found that no federal consitutional violation occurred." This finding is contrary to the record before this court. The record clearly shows that the Municipal Court granted the motion to traverse the warrant and denied the motion to

reconsider that grant. App. "C" RT p.466. App. "E". What the Municipal Court did do is apply the federal exclusionary rule to two of the three counts (required under California's Proposition 8) and to those counts only, found that, for the purpose of admitting only, that there was probable cause and allowed evidence to be admitted as to only those two counts.

It is Petitioner's position that the admission of evidence under the federal exclusionary rule is a different issue than that of the defendant's conduct- then before the Municipal Court or later under a 1983 action. This court has previously agreed with Petitioner's position. In United States v Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.E.d 677, 688 (1984), this court stated:

> "Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate

> from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. Illinois v Gates, supra, at ____, 76 L.Ed.2d 527, 103 S.Ct. 2317.'" (emphasis added) See also, Leon, at headnote 18.

In Illinois v Gates, this court further stated that "The application of the exclusionary rule was merely a routine act, once a violation of the Fourth Amendment had been found." Further, this court noted that "The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally and not a personal constitutional right of the aggrieved". Those cases preceding Leon, considered the use of evidence notwithstanding unconstitutional police conduct reasoning that the conduct and the exclusionary rule were separate issues. If they are separate issues they are separate when considering the application of collateral estoppel. Again, the true circumstance is the police conduct. That issue of conduct should

not be impacted by a judicially created procedure- a fictional portrayal of events in order to admit evidence- so as to prohibit a 1983 action based upon that true state of facts- the unconstitutional conduct.

In Leon, this court further reasoned that "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." If that be the case, then how can the result of a judicial procedure- a fictional creation of events to retest the affidavit- eliminate the harm of that invasion. The true facts support the findings made by the court in traversing the warrant. These facts and findings must control when determining which issue was decided and whether or not that decision precludes a 1983 action. The "retest" is a fictional recreation of events to determine if there was probable cause notwithstanding the unconstitutional conduct.

There is no reason to isolate the reasons

for introduction of the evidence. That is, it is not relevant if the evidence is introduced under the inevitable discovery rule, a retest and finding of probable cause, or admitted to impeach. The axiom is that a civil rights violation is a separate issue from that of the exclusionary rule. The exclusionary rule is in fact moot without a violation of a constitutional right.

A careful review of the record indicates that the Municipal Court first found that Respondent's conduct deserved traversal of the warrant and never changed that finding. See Appendix "E" (Municipal Court Docket) and Appendix "C" RT pp. 317-319, 466. At page 466, the court reiterated its position that Respondent's conduct violated Petitioner's constitutional rights and then went to the issue of sanctions under the federal exclusionary rule. This transcript corresponds to the Municipal Court Docket indicating that the motion to reconsider

traversal was denied.

In passing upon Proposition 8, the California Supreme Court has stated that the application of the federal exclusionary rule will not make unconstitutional conduct constitutional. In re Lance W, 37 Cal.3d 873, 887 (1985). The California Supreme Court therein concurred with this courts reasoning in Leon.

What Respondents and the Ninth Circuit have done is use oral statements of the Municipal Court, made during the remedy phase of the "retest" procedure, to impeach or change the order of the Municipal Court, traversing the warrant, and made final as part of the judgment. This is contrary to the general rule in California. See Yarrow v State of California, 53 Cal.2d 427, 438, 2 Cal.Rptr. 137; DeCou v Howell, 190 Cal. 741, 751, 214 P. 444; Rice v Arden Farms Co., 199 Cal.App.2d 349, 358, 18 Cal.Rptr. 863. As noted in DeCou v Howell, supra, "To hold that

oral or written opinions or expressions of judges of trial court may be resorted to to overturn judgments would be opening the door to mischievous and vexations practices." (190 Cal. at p.751). The oral opinion of the Municipal Court regarding probable cause within the application of the federal exclusionary rule cannot be used to change the order of the court traversing the search warrant. Especially, when the order was made upon findings supported by evidence that Respondent's conduct violated Petitioner's constitutional rights.

Issues presented herein go beyond the issue preclusion as examined by this court in Allen v McCurry, 449 U.S. 90, 66 L.Ed.2d 308 (1980). The scope of the issue is presented to this court. In Haring v Prosise, 462 U.S. 306, 76 L.Ed.2d 595 (1983), this court examined the affect of a guilty plea as preclusive of a Fourth Amendment claim under a subsequent section 1983 claim and found there

was no preclusion as a result of the plea. Because no motion to suppress on Fourth Amendment grounds was ever raised at the state-court proceedings, Haring did not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at a criminal trial in state court. "As we did in Allen v McCurry, [cite] we now leave those questions to another day". Haring, supra n.2 This case presents those questions.

II.

IF THE STATE COURT FINDS PROBABLE CAUSE WHEN APPLYING THE FEDERAL EXCLUSIONARY RULE, WHAT IS THE SCOPE OF THE PRECLUSIVE EFFECT OF THAT FINDING ON A SUBSEQUENT 1983 CIVIL RIGHTS ACTION?

Petitioner cannot find this issue having previously been addressed by this court.

Petitioner suggests that the preclusive effect of any finding by the Municipal Court should be narrowly construed when considering

its effect on a subsequent 1983 Civil Rights action. To do otherwise would deprive the 1983 plaintiff of that fair opportunity to litigate the issue at the trial-court level. For example, had Petitioner been aware that the finding by the Municipal Court as to probable cause, when applying the exclusionary rule and as to only 2 of the three counts, would be applied to preclude him from a subsequent 1983 Civil Rights action, he could have requested reconsideration of that ruling as authorized by Cal. Penal Code section 1538.5. Or, Petitioner could have negotiated a plea that would have allowed the appeal- this would have been an important option because the decision of the Municipal Court was erroneous. See United States v Leon, 468 U.S. 897, 82 L.Ed.2d 677 at 699 ("Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was

false except for his reckless disregard of the truth"). Petitioner left that hearing with the belief that he retained a 1983 action as a result of the traversal of the warrant, the dismissal of the two erroneously decided counts and the continued clear order as to the third count- the one made part of the judgment. The Municipal Court made two decisions; one erroneous and as to counts one and two, and one correct as to count three. The scope of collateral estoppel should not prevent a 1983 action supported by the clear decision of count three.

Collateral estoppel should be precisely focused and limited to only that issue decided. Further, it should be limited to the context of the finding. For example, if Petitioner were to attempt to argue that the federal exclusionary rule, as applied and resolved before the Municipal Court, would not prohibit the introduction of evidence, Petitioner would be precluded. This even

though the finding by the Municipal Court was erroneous. Allen v McCurry, supra at 317. But, on what theory of law or equity can Petitioner be precluded in a 1983 action where the issue is Respondent's conduct. The latter issue was decided in Petitioner's favor by the Municipal Court.

Limitations on the scope of collateral estoppel were recognized by this court in United States of America v International Building Company, 345 U.S. 502, 97 L.Ed. 1182, 73 S.Ct. 807 (1953). This court noted "While the doctrine of res judicata is based upon the public policy of putting and end to litigation, the doctrine is not inflexible, and it has been recognized by the courts that there may exist situations in which the doctrine will yield to considerations of public policy other than those underlying the doctrine." 97 L.Ed. 1193. This court was dealing with a consent judgment- similar to a bargained plea- and questioned the extent to

which such a judgment operates as a collateral estoppel. 97 L.Ed. 1198. The conclusions reached by this court included that such a judgment- one not litigated but settled by stipulation- should be read within its four corners. Id. That is, strictly construed. Petitioner asks that this reasoning be continued when examining the scope to which an issue previously decided operates as to preclude a 1983 Civil Rights action because of collateral estoppel.

For example, the scope of collateral estoppel should not defeat other causes fairly read into the complaint. Within the complaint are contained allegations of respondent's use of the warrant procedure to resolve a civil dispute. This conduct has been recognized to support a 1983 action in Motes v Myers, 810 F.2d 1055, 1060 (11th Cir. 1987). In addition, the Third Circuit, has ruled where defendants misuse of the criminal process through the initiation of criminal action

against a plaintiff, without probable cause or for reasons of personal animosity, is clearly actionable under 1983. Lasch v Borough of Parkesburg Pa., 736 F.2d 903, 907 (3rd.Cir. 1984). Further, the complaint fairly alleges that the district attorney office did not give respondent a fair and impartial investigation prior to the issuance of the warrant. This conduct has been found actionable by the Ninth Circuit [Shah v County of Los Angeles, 797 F.2d 743, (1986)] and California courts [People v Geer, 19 Cal.3d 255, 269 (1977).

When examining the scope of the probable cause finding, within the framework of the exclusionary rule "retest", this court should examine the context within which the finding was made. If, on the one hand the probable cause finding was supported by evidence that the officer acted reasonably and in good faith, the scope of preclusion should preclude a 1983 action. Such would be the case if there was an unintentional "material

omission". If, on the other hand, and as presented herein, the conduct of Respondent's was found unconstitutional, and the probable cause finding was made, after adding back intentionally and recklessly withheld evidence, then, in such case, the preclusive effect of collateral estoppel should be limited to only the issue of evidence exclusion and not preclude a 1983 actin based upon defendant's unconstitutional conduct. As the court has previously stated, collateral estoppel should apply only as to those issues necessary to its judgment. Allan v McCurry, supra at 313. The judgment incorporated the order traversing the search warrant. The application of the exclusionary rule was not necessary to the judgment.

The Seventh Circuit has continually refused to apply collateral estoppel to preclude a 1983 action where the probable cause finding was determined at a preliminary hearing. See Bailey v Andrews, 811 F.2d 366

(7th Cir. 1987); Whitley v Seibel, 676 F.2d 245 (7th Cir. 1982); Brubaker v King, 505 F.2d 534 (7th Cir. 1974). The Seventh Circuit continues to state that at a preliminary hearing the probable cause issue is a question of the sufficiency of the evidence, whereas in the 1983 action the issue is the integrity of the evidence. The Ninth Circuit has never decided this issue and avoided it by its ruling currently at question.

The Seventh Circuit holdings are consistent with petitioner's analysis. If, on retest, the officer was found to have violated the defendant's consitutional rights, the evidence could come in on a retest finding that there was probable cause notwithstanding. However, the integrity of the officers conduct is at question and should be resolved with a 1983 action. If the officer acted in bad faith (no good faith defense) the collateral estoppel doctrine should not apply in his favor. Absent this avenue, a victim of such a

constitutional violation is without remedy. The exclusionary sanction and professional discipline are hallow and ineffective remedies. Gray v Bell, 712 F.2d 490 (D.C. Cir 1983). The felony conduct of respondents (Cal. Penal Code sect. 118a- lying to a magistrate to issue a warrant) has gone unnoticed.

III.

COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED WHEN PRECLUDING CIVIL RIGHTS CLAIMS WOULD BE INEQUITABLE

It is Petitioner's position that a narrow view of collateral estoppel should be applied when precluding a Civil Rights claim because important issues of constitutional protection are at issue.

The Ninth Circuit pointed out that in applying the rules of collateral estoppel, the court looked to the law of the state. Then, citing Teitelbaum Furs v Dominion Insurance Co., 58 Cal.2d 601, 607, 25 Cal.Rptr. 559

(1962), the court noted that under California law "any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action". As posed above, the question is (1) what issue was decided, and now (2) who are the parties, (3) was it necessarily decided or necessary to the judgment. All of these issues go to the scope that this court will allow the doctrine to be applied. If the scope is too broad, or the result is inequitable, the purpose of the doctrine is not served.

The application of the collateral estoppel doctrine in California is not automatic- even as to the same issue decided. The general rule was opined in Bernhard v Bank of America, 19 Cal.2d 807, 810 (1942): "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the

plea is asserted a party or in privity with a party to the prior adjudication?" (supra at 813). Because the issues are not identical and the parties are not the same, the California rule would not apply collateral estoppel. Further, the purposes enunciated in California would not be served by application of the doctrine.

In People v Taylor, 12 Cal.3d 686, 117 Cal.Rptr. 70 (1974), the court recognized that collateral estoppel might not be applied where the defendant was not a party to the prior trial, there is difficulty in identifying the issue resolved in the prior litigation, the unfairness of binding one party and not the other and the undesirability of multiplying the results of a prior erroneous decision. (Id at 696). Each of these policy reasons apply herein. There are civil Respondent's not party to the prior preliminary hearing, there certainly is difficulty identifying the issue resolved (unless this court clarifies) and the

erroneous decision of the Municipal Court is what Respondents have used to apply the doctrine and preclude Petitioner from a prosecution of his Civil Rights claim.

Taylor, reasoned that the purpose of collateral estoppel is to promote judicial economy by minimizing repetitive litigation and prohibit vexatious litigation. (Id at 695) Taylor, required the issue in the prior litigation to be identical to that in the second. (id at 691). There is no evidence that Petitioner's 1983 action is vexatious or repetitive of litigation between Petitioner and the parties to this action. As pointed out in Sandoval v Superior Court, 140 Cal.App.3d 932, 941, (1983), "collateral estoppel is an equitable concept based on fundamental principles of fairness. What can be more unfair than to preclude Petitioner where (1) he has never had the opportunity to litigate his claim as against these Respondents, (2) the litigation is not

vexatious, (3) the issue of Respondent's conduct was decided in favor of Petitioner, and (4) collateral estoppel is being applied to and multiplies the effect of an erroneous decision of the Municipal Court.

Finally, this court recognized additional reasons for not applying the collateral estoppel doctrine. "For example, collateral-estoppel effect is not appropriate when 'controlling facts or legal principles have changed significantly since the state-court judgment' ...(citation)... or when 'special circumstances warrant an exception to the normal rules of preclusion'...(citation)". Haring v Prosise, supra at 605, n.7. This court decided United States v Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), after the erroneous Municipal Court decision relied upon by Respondents. (See Id, 699). See also, People v Costello, 245 Cal.Rptr. 804 (Cal.App. 1 Dist. 1988), wherein the court went through the same analysis and the

Municipal Court herein and the opposite result- the Municipal Court should have stricken the material misstatements and added in the material omissions. Since the only probable cause statement in the affidavit was a pure fabrication, admitted by the witness as such, the finding of probable cause by the Municipal Court, during the retest procedure, was erroneous. Applying collateral estoppel is inequitable and only multiplies the effect of an erroneous ruling made clearly erroneous by subsequent case law.

Therefore, it would be inequitable to not allow petitioner his day in court as against these respondents. Respondents have not been required to answer for their conduct, the 1983 action is not vexatious, the 1983 action is the first action for these respondents- therefor not repetitive, the issues are not identical and to apply the erroneous ruling of the Municipal Court merely multiplies its detrimental effect.

IV.

ATTORNEY FEES MAY NOT BE AWARDED SIMPLY BECAUSE THE COURT DETERMINES THE APPEAL WAS WITHOUT MERIT

The Ninth Circuit found that Petitioner's action herein was "frivolous"...that "collateral estoppel obviously barred Harris' claim. His arguments to the contrary are entirely without merit. We therefore award attorney fees to defendants...". As will be explained, that decision, without reason and any effort to judicially address the issues raised by Respondent; ignored the fact that this Court has yet to define the scope of collateral estoppel- as it might preclude a 1983 action; has previously reasoned that the conduct of a police officer is a separate issue from that of introducing evidence on a probable cause finding; that different issues are thereby presented to the court; the Ninth Circuit has yet to address these scope of collateral estoppel issues; the Seventh

Circuit has three times decided in favor of Petitioner's theory; that the Municipal Court actually traversed the warrant on findings supported by evidence that Respondent's conduct violated Petitioner's Civil Rights; and, that the Seventh Circuit has refused on several occasions to preclude a 1983 action where preceded by some probable cause finding in a preliminary hearing context.

Petitioner has a right to have these issues addressed without the threat of attorney fees. In Christiansburg Garment Co. v EEOC, 434 U.S. 412, 54 L.Ed.2d 648 (1983), this court emphasized that:

> "First, as emphasized so forcefully in Piggie Park, the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority' (citation). Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law...'these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant.'" (Id at 655)

This Court went on to say that in balance, Congress also wanted to protect defendants from burdensome litigation having no legal or factual basis. This Court then concluded that attorney fees should not be awarded defendant "unless the court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after is clearly became so." Id at 657. "In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation". Id.

Within California procedure, Petitioner finds "frivolous" defined. Section 128.5 of the Code of Civil Procedure was enacted by the Legislature for the specific purpose of punishing abuses of the judicial process. Subdivision (a) authorized attorney fees as a

result of "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Section (b)(2) defines "frivolous" to mean "totally and completely without merit" or "for the sole purpose of harassing an opposing party." Clearly, the action of Petitioner is not "totally and completely without merit". On the decisions of the Seventh Circuit, alone, Petitioner had a right to rely. This, because the Ninth Circuit has yet to address the issue of preclusion where the issue allegedly was decided at a preliminary hearing. Add to that this courts prior reservation of the issue of scope of preclusion, and Petitioner was compelled to address that issue before the court.

The California Supreme Court has reasoned that "an appeal is not frivolous if any of the legal points are arguable on their merits". Flaherty v Flaherty, 31 Cal.3d 637, 649, 183 Cal.Rptr. 508 (1982). The court went on to

say:

> "...an appeal should be held to be frivolous only when it is prosecuted for an improper motive- to harass the respondent or delay the effect of an adverse judgement- or when any reasonable attorney would agree that the appeal is totally and completely without merit" Id.
>
> ...any definition must be read so as to avoid a serious chilling effect on the assertion of litigants rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous...."

The Flaherty court went on to note that courts cannot be blind to the obvious- the borderline between a frivolous appeal and one which simply has not merit is vague indeed. The power to punish should be used most sparingly to deter only the most egregious conduct. The Ninth Circuit did not consider these axioms.

Where the issue standing, or right to bring the action, has been more obvious as

against the plaintiff, this court has sided with the plaintiff on the attorney fee question. In Christiansburg, the EEOC brought action against the defendant company on behalf of a plaintiff at a time the matter was clearly not "pending" as that term is set forth within Title VII, and required as a prerequisite, to bringing the action. In Hughs v Rowe, 449 U.S. 5, 66 L.Ed2d 163 (1980), plaintiff failed to even state a cause of action under 1983 and this court was able to find that there was some ground or basis to bring the action- therefore, attorney fees were not to be awarded defendant. This court noted that "pro se plaintiffs cannot simply be assumed to have the same ability as plaintiff represented by counsel to recognize the objective merit (or lack of merit) of a claim." Id at 15.

The Ninth Circuit order deals with an award of attorney fees by this unsuccessful pro se petitioner on appeal. The record

reflects that Petitioner was represented by counsel prior to appeal and that the issues now addressed by Petitioner were not addressed to the District Court. That is, the question of the scope of collateral estoppel and whether it should apply to Respondents conduct merely because the Municipal Court found cause for introduction of evidence, was never addressed to the District Court by Petitioner's counsel.

If any legal or factual basis exists for the appeal and petition herein, there should not be an award of attorney fees to defendants. Petitioner has merely asked for an interpretation of this courts decision in United States v Leon, 468 U.S. 897, 82 L.Ed.2d 677, 688, wherein this court stated clearly that whether the exclusionary sanction is imposed [or not on a finding of probable cause] is a separate issue from the question of whether Fourth Amendment rights have been violated by Respondents conduct. If the

issues are separate, an adverse decision on the former cannot preclude a 1983 action on the latter. Therefore, even if the decision is against Petitioner, there is no basis for an award of attorney fees to defendants.

CONCLUSION

The exclusionary rule is a judicially created fiction. That is, the "retest" of a warrant is a fabrication of events to reconstruct the warrant and affidavit as if the officer had not violated the victims constitutional rights. The true circumstances are the findings made in traversing the warrant as a result of unconstitutional conduct- that is what really happened. To allow findings made during the artificial retest procedure to vacate a court order supported by findings and evidence of actual events, would indeed make a dead letter of 1983 Civil Rights actions. Respondents have thus far taken advantage of oral statements contrary to the judgment made within the

context of a judicially created fiction.

There are two decisions of the Municipal Court. One clearly traversing the warrant, denying reconsideration and not applying the federal exclusionary rule erroneously. That was to count three- the one forming the judgment. The other decision was the same as the former but muddy because of the erroneous application of the federal exclusionary rule. Why must the erroneous, inconsistent decision be the focus of attention.

The scope of the collateral estoppel doctrine has not been clearly decided by this court. Within any interpretation, the doctrine should not defeat other claims fairly read into the complaint. Further, the doctrine should be narrowly construed so as not to defeat important constitutional protection.

The policy behind the doctrine is equitable. It should not be applied when the context of the finding is (1) erroneous, and

(2) where the officer acted in bad faith. To allow an erroneous decision to be multiplied in its effect is not equitable. Further, where the retest of the warrant is under circumstances that show that the officer acted in bad faith, the doctrine should not apply to defeat a 1983 action.

There is a fair argument on each of the issues presented herein. Therefore attorney fees should not have been awarded defendants. The court may find that these arguments have no merit but that finding does not equate to a finding that bringing them forward is frivolous.

THEREFORE, Respondent respectfully requests that this petition for writ of certiorari should be granted and/or that attorney fees not be awarded defendants.

Respectfully Submitted,

_____

Jean Leonard Harris, pro se

CERTIFICATE OF SERVICE

On July 28, 1988, I served the attached WRIT OF CERTIORARI, on the interested parties in this action, by mailing a coy to the following:

Paul Bruce, Esq.
Deputy County Counsel
1600 Pacific Highway, Rm 235
San Diego, California 92101-2467

Michael Lipman, esq.
Lorenz, Alhadeff and Lundin
101 West Broadway, Ste 1500
San Diego, California 92101

Gregory Post, Esq.
701 B Street, Ste 1400
San Diego, California 92101

Executed this 29th day of July, 1988, at Rancho Mirage, California.

Jean Leonard Harris

16776 Bernardo Center Dr. Ste 110B
San Diego, California, 92128

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEAN LEONARD HARRIS Plaintiff-Appellant, v. DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, ET AL Defendants-Appellees.	NO. 86-6570 D.C. No.CV-84-0767-T MEMORANDUM* FILED JAN 25 1988

Appeal from the United States District Court for the Southern District of California Howard B. Turrentine, District Judge, Presiding Argued and Submitted December 11, 1987, San Diego, California.

Before: WALLACE, NORRIS, and THOMPSON, Circuit Judges.

Harris appeals from the district court's dismissal of his 42 U.S.C section 1983 claim that the defendants violated his Fourth Amendment rights as a result of a search of his office and residence and the seizure of documents. Applying the doctrine of

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3

collateral estoppel, the district court granted defendants' Motions for Summary Judgment. The court held in part that Harris was precluded from relitigating issues already raised in his state court criminal proceeding and that the Municipal Court had already ruled in that proceeding that the searches and seizure in question did not violate Harris' federal constitutional rights. We affirm. We also hold that the district court did not abuse its discretion when it refused to permit further discovery at the time of the summary judgment motions.

The legal determination that collateral estoppel was available to bar Harris' Section 1983 claim is reviewed de novo. United States v Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984). The district court's application of the doctrine, if available, is reviewed for abuse of discretion. Id.

In determining whether an issue has been fully and fairly litigated such that estoppel can apply, federal courts look first to the law of the state in question. Parsons Steel, Inc. v First Alabama Bank, 106 S.Ct. 768, 772

(1986). Under California law, "any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action." Teitelbaum Furs, Inc. v Dominion Insurance Co., 58 Cal.2d 601, 607, 25 Cal.Rptr.559, 375 P.2d 439 (1962).

The gravamen of Harris' section 1983 action was his claim that the defendants violated his Fourth Amendment rights by obtaining a search warrant and conducting a search and seizure of documents in his home and office without probable cause. Harris litigated precisely this Fourth Amendment issue before the Municipal Court in the context of his motions to suppress evidence and to traverse the search warrants. In ruling on these motions, the Municipal Court found that no federal consitutional violation occurred. When Harris pled guilty and waived his rights to appeal in the state criminal proceeding this ruling became final. People v Charles, 171 Cal.App.3d 552, 557 (1985). Because the Fourth Amendment issue underlying Harris' civil action was fully litigated in

the state court criminal proceeding, collateral estoppel was available to bar Harris' Section 1983 claim and the district court did not abuse its discretion in dismissing Harris' complaint on that ground.

Appellant also argues that the district court abused its discretion in denying his motion to compel additional discovery befcre ruling on defendants' motions for summary judgment. Since none of the materials sought by appellant would have assisted him on the dispositive issue in the case, the district court did not abuse its discretion in denying appellant's motion to compel discovery.

With the exception of defendant Klarfeld, all of the defendants have requested attorney fees pursuant to 42 U.S.C. section 1988. Under that section, defendants in section 1983 actions are entitled to attorneys' fees when the plaintiff's action is frivolous. Roberts v Spaulding, 783 F.2d 867, 874 (9th Cir.), cert. denied, 107 S.Ct. 399 (1986). Here the doctrine of collateral estoppel obviously barred Harris' claim. His arguments to the contrary are entirely without merit. We

therefore award attorneys' fees to defendants Lorenz, Herpolsheimer, Samson, Shinnick, and Waight.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEAN LEONARD HARRIS Plaintiff-Appellant, v. DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, ET AL Defendants-Appellees.	NO. 86-6570 D.C. No.CV-84-0767-T ORDER FILED APR 7 1988

Before: WALLACE, NORRIS, and THOMPSON, Circuit Judges

The panel, as constituted above, has unanimously voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The suggestion for a rehearing en banc is REJECTED.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEAN LEONARD HARRIS Plaintiff-Appellant, v. DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, ET AL Defendants-Appellees.	NO. 86-6570 D.C. No.CV-84-0767-T RECEIVED APR 21 1988 FILED MAY 31, 1988 ENTERED JUN 15 1988 (stamped on document)

APPEAL from the United States District Court for the SOUTHERN Dictrict of CALIFORNIA.

THE CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered JANUARY 25, 1988

GEORGE WEINGARTEN
Attorney at Law
1168 Union Street
Suite 400
San Diego, California 92101
Telephone (619) 233-5265

FILED

BY

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JEAN LEONARD HARRIS Plaintiff, vs. DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity, DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, individually and in his official capacity, DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity, COUNTY OF SAN DIEGO, RONALD HERPOLSHEIMER, JAMES LORENZ, and MYRON KLARFELD, Defendants.	CASE NO. '840767 T (M) COMPLAINT FOR DAMAGES AND JURY DEMAND

Plaintiff, Jean Leonard Harris, by and through his attorney, complains against defendants and alleges on knowledge as to defendants and each of them as follows:

B

BEST AVAILABLE COPY

I

PARTIES

1. Defendant, ANTHONY SAMSON, is a Deputy District Attorney in charge of the District Attorney fraud division and formerly the subordinate to defendant JAMES LORENZ, and in doing the things herein alleged acted under color of his authority as such; is sued herein in his individual capacity and in his capacity as Deputy District Attorney.

2. Defendant, DUANE SHINNICK, is a Deputy District Attorney within the District Attorney fraud division and is sued herein individually and in his capacity as Deputy District Attorney.

3. Defendant, HAROLD WAIGHT, is an investigator for the District Attorney fraud division, under the supervision of SAMSON and formerly under the supervision of defendant LORENZ, and in doing the things herein alleged acted under color of his authority as such; is sued herein in his individual capacity and in his capacity as investigator for the District Attorney.

4. Defendant, RONALD HERPOLSHEIMER, is an investigator currently in the employ of JAMES LORENZ, Esquire, and formerly an investigator for the District Attorney fraud division under the supervision of SAMSON and formerly LORENZ.

B

BEST AVAILABLE COPY

5. Defendant, JAMES LORENZ, is currently an attorney in private practice, and formerly the head of the District Attorney fraud division for approximately 12 years supervising defendants SAMSON, WAIGHT and defendant HERPOLSHEIMER and in doing the things herein alleged represented and acted under the instruction of defendant KLARFELD.

6. Defendant, MYRON KLARFELD, is an attorney with offices in Beverly Hills, California, representing TOM LIGUORI.

7. TOM LIGUORI is a resident of the City of Poway, California, and herein acted as the employer of defendants KLARFELD, LORENZ, and HERPOLSHEIMER.

8. Defendant, COUNTY OF SAN DIEGO, is the employer of SAMSON, SHINNICK, AND WAIGHT, and, as such, the County of San Diego and the District Attorney's office, and pursuant to the official policy of the County of San Diego, as created and established by Edwin Miller, District Attorney for the County of San Diego, these defendants were acting under color of the authority of the District Attorney's office as established by the County of San Diego.

II

JURISDICTION AND VENUE

9. This action is necessitated by the acts of and conspiracy between defendants, and each of them, to violate plaintiff's civil rights by falsely, maliciously, wilfully and recklessly alleging that Plaintiff Jean Leonard Harris had committed a crime and misrepresenting same to the Honorable E. Mack Amos, Judge of the Municipal Court, San

B

BEST AVAILABLE COPY

Diego Municipal District, in order to obtain a search warrant to search the office and residence of Jean Leonard Harris, all in violation of Plaintiff's rights secured by the Fourth Amendment to the United States Constitution, and the Federal Civil Rights Act, 42 U.S.C., section 1983, and designed to injure Jean Leonard Harris by securing the removal of plaintiff as the City Attorney of the City of Poway.

10. Plaintiff seeks money damages and attorney fees to redress the injury caused to plaintiff by the unconstitutional acts of defendants and each of them in violation of plaintiff's civil rights secured by the Fourth Amendment to the Unites States Constitution, and the Federal Civil Rights Act, 42 U.S.C., section 1983. Jurisdiction of the court is invoked under 28 U.S.C., section 1343.

11. Venue is proper pursuant to 28 U.S.C., section 1391 in this District as all the events alleged herein occurred within the Southern District.

III

CLAIM FOR RELIEF FOR VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS; CONSPIRACY

12. Prior to June 30, 1983, Jean Leonard Harris attempted construction of a road, pursuant to a grant of easement to Environco Properties Inc., of which plaintiff was president, over real property LIGUORI was intending to purchase. At the commencement of said construction defendant KLARFELD represented to plaintiff that defendant KLARFELD was representing LIGUORI as his attorney. At said time, defendant KLARFELD demanded plaintiff to cease construction

BEST AVAILABLE COPY

and threatened the life, health and security of plaintiff by stating, among other things, that defendant KLARFELD'S client was a member of "The Family"; that "they had the best connections downtown"; could have plaintiff "taken care of"; if plaintiff "knew what was good" for plaintiff, plaintiff should stop the road construction; if plaintiff did not stop defendant KLARFELD stated that he could not be responsible for what would happen to plaintiff. In doing the things hereinafter alleged, defendant KLARFELD did use "connections" within the District Attorney office to have plaintiff "taken care of" by removal of plaintiff from his public office as City Attorney for the City of Poway, all as revenge for certain alleged actions of plaintiff complained of in his capacity as City Attorney.

13. Prior to June 30, 1983, LIGUORI presented to the City of Poway, a development plan for the development of that same real property referred to in paragraph 12. At said time, Jean Leonard Harris was the City Attorney for the City of Poway. Prior to LIGUORI'S submittal, plaintiff recused himself from said development proposal. To assist in the approval of said development plan, defendant KLARFELD retained the services of defendant LORENZ. Said plans were not approved by the City of Poway and on June 3, 1983, defendant LORENZ filed civil action in the Superior Court for the State of California, San Diego Judicial District, alleging, inter alia, that plaintiff was responsible for said denial and, as such, there existed a conflict of interest. Said action was later decided in favor of plaintiff and the

B

City of Poway. While said action against plaintiff was pending, defendant LORENZ used his influence over the District Attorney's office by requesting defendant SAMSON, his former subordinate and now current head of the fraud division of the District Attorney's office, to have plaintiff investigated by the Grand Jury for the same alleged conflict in interest; to have plaintiff prosecuted for an alleged violation of Business and Professions Code, section 11010; to have plaintiff's office and residence searched without probable cause to do so, and directed defendant HERPOLSHEIMER to assist in the preparation of said search warrant and affidavit in support thereof; all with the intent and design to injure and damage plaintiff by and through obtaining plaintiff's removal as City Attorney as a result of publicity from these unlawful acts of defendants, all without a good faith belief in the propriety of their actions and in violation of plaintiff's rights under 42 U.S.C. 1983.

14. Prior to June 30, 1983, defendant HERPOLSHEIMER through defendant WAIGHT, as affiant, prepared an affidavit in support of a search warrant and a search warrant for the search of plaintiff's office and residence. In preparing said affidavit, defendant HERPOLSHEIMER through defendant WAIGHT manufactured facts indicating Jean Leonard Harris advertised real property for sale without approval of the Department of Real Estate, in violaton of Business and Professions Code section 11010, and misrepresented same to the Honorable E. Mack Amos, judge of the Municipal Court, in order to establish probable cause for said search warrant.

B

In addition, said defendants misrepresented defendant HERPOLSHEIMER'S statements and position in said affidavit to Judge Amos, in order to recklessly and with the intent to deceive and mislead Judge Amos into approving said search warrant. Defendant SHINNICK reviewed said affidavit and search warrant and approved of same prior to submittal to Judge Amos, all without independently verifying the truth or accuracy of said affidavit, and/or ignored the lack of said truth as a participant in the conspiracy to violate plaintiff JEAN LEONARD HARRIS' constitutional rights to be free from illegal searches and seizures.

15. On June 15, 1983, affiant defendant WAIGHT, "subscribed and sworn to" the accuracy of said affidavit before the Honorable E. Mack Amos, in order to obtain a search warrant for the office and residence of plaintiff, at a time defendant WAIGHT knew or should have known there was no probable cause to obtain said search warrant in that certain facts were falsely set forth in said affidavit. Said affidavit indicated that the sole witness in support thereof was defendant HERPOLSHEIMER and that said defendant HERPOLSHEIMER "responded to a newpaper advertisement concerning the sale of lots by Environco" (Jean Leonard Harris is the president thereof), and suggests defendant HERPOLSHEIMER obtained a brochure in response thereto. In truth and fact, defendant HERPOLSHEIMER was later to testify under oath before the Honorable Judge Amos, that these facts were false.

16. On June 15, 1983, affiant defendant WAIGHT,

B

defendants SHINNICK and SAMSON, failed to inform Judge Amos, that; the sole witness in support of the affidavit in support of the search warrant was an employee of defendant LORENZ; that the brochure referred to in said affidavit in fact came from defendant KLARFELD, the client of defendant LORENZ; that defendant LORENZ had filed a civil complaint against Jean Leonard Harris, as City Attorney for the City of Poway, alleging a conflict of interest in regard to defendant LORENZ' client LIGUORI'S development denial; that there were "hard feelings" between defendant LORENZ and defendant KLARFELD and Jean Leonard Harris evidenced by remarks in various news papers; that all of the evidence used by the District Attorney's office in support of the affidavit supporting the search warrant was provided by defendant LORENZ' office through defendant HERPOLSHEIMER to defendant SAMSON and was not independently reviewed by the District Attorney's office to determine its authenticity nor credibility and as such the District Attorney's office was merely being used as a conduit for Liguori, defendant KLARFELD and defendant LORENZ to seek revenge against plaintiff and injure plaintiff where they were unable to do so in their civil action against plaintiff; that defendant KLARFELD had directed defendant LORENZ to contact the District Attorney office's and make the above misleading and false allegations against plaintiff; that defendant SAMSON had knowledge of the litigation and animosity between defendant LORENZ, defendant KLARFELD, and plaintiff.

17. On June 30, 1983, the office and residence of

B

plaintiff Jean Leonard Harris was searched pursuant to the order made by Judge Amos in reliance on the affidavit in support thereof attested to by defendant WAIGHT and reviewed by defendant SHINNICK and approved by defendant SAMSON. Thereafter, press media printed articles injurious to the reputation and character of plaintiff Jean Leonard Harris and as a result of said search and newspaper articles Jean Leonard Harris was replaced in his position as City Attorney for the City of Poway and was never able to regain said position as a result of this damage to plaintiff's reputation and character. No criminal complaint was issued against Jean Leonard Harris until months after the unlawful search of plaintiff's office and residence and months after plaintiff was released as City Attorney as a result of the unlawful search and resulting publicity herein described.

18. On November 21, 1983, Judge Amos found that such evidence referred to in paragraph 16, was "material" in that the existence of such evidence bears on the credibility of the informant, whether or not there is any bias or motive which would give rise to the possibility of false information; that in not putting that information upon the affidavit "the District Attorney acted recklessly, and it was the affiant that was reckless", and as such violated plaintiff's constitutional rights to be free from unwarranted search as protected by the Fourth Amendnment of the United States Constitution.

19. Plaintiff alleges that in doing the things hereinabove set forth defendants knew or should have known

that they were violating the constitutional rights of plaintiff as hereinabove set forth but defendants proceeded in bad faith notwithstanding, and with the intent to have Jean Leonard Harris "taken care of" by removal as the City Attorney for the City of Poway. Said violation of plaintiff's constitutional rights by defendants was an improper use of the public office of the District Attorney in order to further the private interests of defendants KLARFELD and LORENZ. In doing the acts herein alleged defendants have acted under color of state law in violating the constitutional rights of plaintiff as preserved by the Fourth Amendment of the Constitution of the United States and the Federal Civil Rights Act, 42 U.S.C. 1983.

20. As a direct result of defendants violating the constitutional rights of plaintiff, by doing and conspiring to unlawfully search the office and residence of Jean Leonard Harris and through recklessly and falsely alleging plaintiff's involvement in criminal conduct to Judge Amos, Jean Leonard Harris was released from his position as City Attorney for the City of Poway, a position held by plaintiff since incorporation of that City in 1980. Plaintiff has not been able to regain his position as City Attorney due to the adverse publicity surrounding the search of plaintiff's office and residence and the publicity given to the recklessly misleading affidavit in support of search warrant. As such, plaintiff was required to expend considerable amounts in legal fees to preserve and protect plaintiff's rights and, in addition, has suffered actual damages

B

BEST AVAILABLE COPY

degradation, humiliation, embarrassment and extreme emotional distress as a result of the unlawful search and seizure, the publicity resulting therefrom and the loss of plaintiff's position as City Attorney for the City of Poway, all to his damage in the amount of $5,000,000.00.

21. Defendants County of San Diego, Deputy District Attorneys Samson and Shinnick and District Attorney investigator Waight did the acts alleged herein oppressively and maliciously and recklessly, and plaintiff is entitled to punitive or exemplary damages in the sum of $10,000,000.00.

22. Each and every individual defendant who participated in this conspiracy acted with malice, oppression and reckless disregard of plaintiff's rights under the constitutional laws of the United States. Plaintiff is therefore entitled to punitive and exemplary damages from each defendant who participated in the conspiracy. In order to punish each defendant and to make an example of them, plaintiff seeks punitive damages in the amount of $5,000,000.00 from each said defendant except defendants Klarfeld, Lorenz, Shinnick and Samson. Defendants Klarfeld, Lorenz, Shinnick and Samson are attorneys licensed to practice law in the State of California, and as such familiar with the constitutional laws and rights as protected under the United States Constitution. In order to punish these named defendants, and make an example of them, plaintiff seeks $10,000,000.00 in punitive damages from each said defendant.

WHEREFORE, plaintiff respectfully requests the

B

BEST AVAILABLE COPY

following relief:

1. Compensating damages from defendants in the sum of $5,000,000.00;

2. Punitive and exemplary damages in the amount of $5,000,000.00 against each and every defendant who participated in the conspiracy to deny plaintiff his constitutional rights, except defendants KLARFELD, LORENZ, SHINNICK and SAMSON and as to each of them the sum of $10,000,000.00;

3. Attorney's fees;

4. Cost of suit and all other just relief.

DATED:

GEORGE WEINGARTEN
Attorney for Plaintiff

Plaintiff demands jury in the action, pursuant to F.R.C.P. 38(a).

DATED:

GEORGE WEINGARTEN
Attorney for Plaintiff

BEST AVAILABLE COPY

C163

IN THE MUNICIPAL COURT OF THE SAN DIEGO JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

DEPARTMENT NUMBER 6 BEFORE HON. E. MAC AMOS, JR., JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, V. JEAN LEONARD HARRIS, DEFENDANT.	PRELIMINARY EXAMINATION CR _____ F 79822 A 71659

COPY

REPORTER'S TRANSCRIPT

SAN DIEGO, CALIFORNIA

NOVEMBER 2, 1983

VOLUME II

COUNSEL APPEARING:

FOR THE PLAINTIFF: EDWIN L. MILLER, JR.
DISTRICT ATTORNEY
BY: DUANE E. SHINNICK
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: CHARLES L. GOLDBERG
ATTORNEY AT LAW

DUANE E. RANKIN, CSR 1502
MUNICIPAL COURT REPORTER
SAN DIEGO COUNTY COURTHOUSE
SAN DIEGO, CALIFORNIA 92101

COMPUTERIZED TRANSCRIPTION

C

Q. YOU DISCUSSED IT WITH HIM, THOUGH, DIDN'T YOU?
A. THE -- OF PROVIDING HIM WITH THE INFORMATION?
Q. YES.
A. YES, I BELIEVE I DID.
Q. ALL RIGHT. HE, IN FACT, ASKED YOU FOR THE DESCRIPTION FOR THE SEARCH WARRANT, DIDN'T HE?
A. I BELIEVE HE DID, YES.
Q. AND YOU PROVIDED THAT TO HIM, DEFENDANT'S EXHIB C, IN RESPONSE TO HIS REQUEST FOR THE DESCRIPTION OF THE PLA TO BE SEARCHED?
A. YES.
Q. WHAT OTHER INFORMATION DID YOU SUPPLY HIM REGAR THE SEARCH WARRANT AND THE ITEMS TO LOOK FOR?
A. I BELIEVE THAT WAS THE EXTENT OF THE INFORMATIO FURNISHED HIM THAT IS ON THIS SEARCH WARRANT.
Q. DID YOU TELL HIM WHAT TYPE OF DOCUMENTS HE COUL LOOK FOR THAT WOULD BE PROBABLY IN JEAN HARRIS' POSSESSION?
A. NO.
Q. DID YOU -- DID YOU TELL MR. WAIGHT -- DID MR. WAIGHT ASK YOU TO -- PLEASE STRIKE THAT.
DID YOU TELL MR. WAIGHT THAT YOU HAD RESPONDED NEWSPAPER AD IN WHICH THE PROPERTY, THE EAGLES NEST, WAS BE OFFERED FOR SALE?
A. I DON'T BELIEVE IT WAS A NEWSPAPER AD, I BELIE WAS A BROCHURE THAT I HAD SEEN.
Q. YOU DID NOT RESPOND TO ANY NEWSPAPER AD THAT W OFFERING PROPERTY AT EAGLES NEST FOR SALE?
A. I BELIEVE THERE WAS A NEWSPAPER AD ALSO FROM

COLDWELL BANKER, I BELIEVE, IN RANCHO BERNARDO.

Q. OKAY. BUT YOU DIDN'T RESPOND TO THAT, DID YOU?

A. I CONTACTED A REAL ESTATE AGENT FOR COLDWELL BANKER IN RANCHO BERNARDO. I BELIEVE THAT WAS IN REFERENCE TO A REFERRAL I HAD RECEIVED FROM ANOTHER AGENT IN ANSWER TO AN AD OR A BROCHURE, I DON'T RECALL WHICH.

Q. WELL, DIDN'T YOU, IN FACT, GET A BROCHURE FROM EAGLES NEST FROM ONE OF YOUR CLIENTS?

A. YES.

Q. AND FROM THAT BROCHURE YOU CONTACTED THE REAL ESTATE AGENTS?

A. NO. THERE IS NO AGENT LISTED ON THE BROCHURE. MR. HARRIS IS LISTED ON THE BROCHURE.

Q. WELL, FROM THE BROCHURE HOW DID YOU DETERMINE WHAT AGENT TO CONTACT?

A. IT MUST HAVE BEEN THE NEWSPAPER AD NOW THAT I RECALL.

Q. DO YOU RECALL?

A. AS I RECALL THE BROCHURE -- I HAVEN'T LOOKED AT IT LATELY, BUT I BELIEVE THE ONLY NAME ON IT IS MR. HARRIS'.

Q. OKAY. BUT THE BROCHURE YOU GOT FROM ONE OF YOUR CLIENTS?

A. YES.

Q. YOU DID NOT GET THAT FROM THE REAL ESTATE BROKER?

A. NO.

Q. DID YOU LATER GIVE THAT BROCHURE TO MR. WAIGHT?

A. I GAVE HIM A COPY OF IT, YES.

Q. I WOULD ASK YOU TO LOOK AT WHAT HAS BEEN LABELED

EXHIBIT P TO THE PEOPLE'S 25-A AND TELL ME IF THAT APPEARS TO E
A PHOTOCOPY OF THE BROCHURE THAT YOU GOT FROM YOUR CLIENT
RELATING TO THE PROPERTY OF EAGLES NEST.

A. YES, IT DOES.

Q. AND THAT IS THE SAME BROCHURE, THE SAME ITEM, THA
YOU PROVIDED TO MR. WAIGHT?

A. YES.

Q. WHEN YOU PROVIDED IT TO HIM, DID YOU TELL HIM THA
YOU HAD OBTAINED THAT FROM YOUR CLIENT?

A. AS I RECALL, THAT WAS PROVIDED TO MR. SAMSON DURI
OUR INITIAL MEETING WITH HIM, AND I BELIEVE THAT HE WAS INFORM
THAT WE RECEIVED IT FROM A CLIENT.

Q. NOW, DID YOU EVER RESPOND TO A NEWSPAPER
ADVERTISEMENT ADVERTISING LOTS FOR SALE AT EAGLES NEST WITH TH
INTENTION OF PURCHASING A LOT?

A. NOT WITH THE INTENTION OF PURCHASING IT, NO.

Q. YOU WERE NEVER SERIOUSLY INTERESTED IN PURCHASING
ANY PROPERTY OF EAGLES NEST, WERE YOU?

A. NO.

Q. OKAY. DO YOU RECALL SPECIFICALLY RESPONDING TO A
PARTICULAR NEWSPAPER ADVERTISEMENT THAT CONCERNED THE SALE OF
LOTS AT EAGLES NEST?

A. I DON'T BELIEVE IT WAS IN RESPONSE TO A NEWSPAPE
AD, I BELIEVE IT WAS IN RESPONSE TO A REFERRAL FROM ANOTHER
AGENT.

Q. OKAY. DID YOU EVER TELL MR. WAIGHT THAT YOU
RESPONDED TO A NEWSPAPER AD THAT WAS ADVERTISED OFFERING LOTS
FOR SALE AT EAGLES NEST?

A. I DON'T BELIEVE SO.

Q. WERE YOU EVER OFFERED ONE OF THE LOTS FOR SALE BY ANYONE?

A. YES.

Q. DID YOU EVER GO LOOK AT THEM?

A. NO.

Q. DID YOU EVER GO AHEAD AND GET THE LEGAL DESCRIPTIC OF THE LOT YOU WERE OFFERED FOR SALE?

A. I WAS FURNISHED A COPY OF A -- OF A PLAT MAP WITH THE VARIOUS PARCELS MARKED ON IT. THIS WAS RECEIVED FROM THE AGENT.

Q. WERE YOU ADVISED THAT ALL THOSE PARCELS WERE FOR SALE AT ONE TIME?

A. I BELIEVE ALL EXCEPT TWO, ONE OR TWO, ANY ONE OR ALL OF THEM WAS FOR SALE.

Q. WEREN'T YOU ADVISED THAT THEY WERE TRYING TO BULK SELL THEM ALL?

A. AGAIN, THE AGENT INFORMED ME THAT -- HE GAVE ME INDIVIDUAL PRICES FOR EACH PARCEL TO START WITH AND ALSO INDICATED THAT THEY WERE AVAILABLE EITHER BY PARCEL BASIS OR THAT I COULD MAKE AN OFFER FOR ALL OF THEM.

Q. DID YOU EVER SERIOUSLY ENTER INTO ANY NEGOTIATION FOR THE PURCHASE OF ANY OF THOSE LOTS?

A. NO.

Q. WAS THERE JUST A CASUAL INQUIRY BY YOU IN THE COURSE OF YOUR EMPLOYMENT?

A. NO.

Q. I MEAN YOU WERE MAKING THIS INQUIRY AS PART OF YO

EMPLOYMENT IN YOUR INVESTIGATION, WEREN'T YOU?

A. YES.

Q. OKAY. DID YOU TELL MR. WAIGHT WHEN YOU TALKED TO HIM ABOUT THIS PROPERTY BEING OFFERED FOR SALE THAT IN THE COURSE OF YOUR INVESTIGATION YOU GOT THIS INFORMATION?

A. YES.

Q. HE NEVER -- I MEAN YOU NEVER LED HIM ON TO BELIEVE THAT YOU WERE OUT THERE TRYING TO BUY ONE OF THOSE LOTS AND HEARD ABOUT IT, DID YOU?

A. NO.

Q. DO YOU REMEMBER WHO THE BROKER WAS THAT YOU GOT TH INFORMATION FROM ABOUT THOSE LOTS?

A. IT WASN'T A BROKER, IT WAS AN AGENT, AND I DON'T RECALL HIS NAME. I BELIEVE IT'S IN THE INFORMATION THAT WE FURNISHED TO YOU.

MR. GOLDBERG: I HAVE NOTHING FURTHER, YOUR HONOR.

THE COURT: CROSS-EXAMINATION?

MR. SHINNICK: YES, YOUR HONOR.

CROSS-EXAMINATION

BY MR. SHINNICK:

Q. MR. HERPOLSHEIMER, DID YOU SEE ANY OF THE NEWSPAPE ADS FOR THIS PROPERTY LAST SPRING?

A. NOT FOR THIS SPECIFIC PROPERTY. I BELIEVE I USED THE NEWSPAPER TO GET THE NAME OF AN AGENT IN THE AREA AND THEN IN TURN WAS REFERRED BY THAT AGENT WHO KNEW OF THE AGENT WHO HA THE LISTING FOR THE PROPERTY IS THE WAY IT WENT.

Q. WITH RESPECT TO THE CHART THAT'S BEEN MENTIONED, D

C

NOTICE OF INTENT TO SELL OR FAILURE TO OBTAIN A WHITE PAPER BEFORE SELLING. THOSE ARE THE ONLY ISSUES.

THE COURT: I UNDERSTAND.

MR. GOLDBERG: AND WHETHER OR NOT A PERSON HAS AN INTENT TO DIVIDE PROPERTY FOUR-BY-FOURING, HOWEVER, BY TRANSFERRING PROPERTY BACK AND FORTH, THAT'S NOT A CRIME. THERE IS NO CRIME WITH THAT. YOU CAN FOUR-BY-FOUR A HUNDRED TIMES. YOU CAN TRANSFER TO YOUR SISTER, YOUR BROTHER. THERE IS ADMINISTRATIVE REMEDIES WITHIN THE COUNTY FOR THAT TO ASSURE THE COUNTY THAT THE IMPROVEMENTS THAT THEY REQUIRE ARE PUT IN. BUT THERE IS NO CRIMES WITH THAT.

AND I SAY THAT BECAUSE IN THE EARLIER MOTION I MADE REGARDING THE ESTEYBAR, YOUR HONOR KEYED INTO WHAT APPEARED TO BE FROM LETTERS, INTENTS -- INTENTIONAL MISREPRESENTATIONS POSSIBLY OF THE FOUR-BY-FOURING, IF WE CALL IT THAT. BUT THAT IS NOT CRIMINAL.

HERE IN THE WARRANT, THE AFFIDAVIT THAT WAS PRESENTED TO YOUR HONOR, THE ONLY INFORMATION ABOUT ANYTHING ILLEGAL IS CONTAINED ON PAGE 4 IN THE LINES 15 THROUGH 21 -- PARDON ME -- 15 THROUGH 26.

THE COURT: LET ME GET A COPY OF THAT AFFIDAVIT SO I CAN FOLLOW YOU.

ANY OTHER EXHIBIT?

MR. SHINNICK: I HAVE THE COURT EXHIBIT, YOUR HONOR.

MR. GOLDBERG: DO YOU NEED A COPY, MR. SHINNICK? DON'T YOU HAVE ONE?

THE COURT: DO YOU NEED A COPY, MR. SHINNICK?

MR. SHINNICK: YES, YOUR HONOR. I DON'T HAVE ONE WITH

IN COURT.

MR. GOLDBERG: DO YOU HAVE AN EXTRA ONE?

MR. FRANT: YES.

NOTE: DOCUMENT HANDED TO MR. SHINNICK.

THE COURT: ALL RIGHT.

MR. GOLDBERG: YOUR HONOR, DIRECTING THE COURT TO PAGE 4 --

THE COURT: YES. WHICH LINE?

MR. GOLDBERG: LINES 15 THROUGH 26.

THE COURT: ALL RIGHT.

MR. GOLDBERG: THE ONLY INFORMATION IN THAT AFFIDAVIT THAT RELATES TO ANY TYPE OF POSSIBLE WRONGFUL OR CRIMINAL ACTIVITY AND THE ONLY SOURCE OF INFORMATION IS RONALD HERPOLSHEIMER.

THE COURT: THAT'S THE ONLY INFORMATION IN HERE THAT SHOWS THAT THESE LOTS WERE GOING TO BE OFFERED FOR SALE?

MR. GOLDBERG: THAT'S CORRECT. AND WITHOUT THAT THERE I NO CRIME.

THE COURT: YOU CAN SPLIT -- YOUR ARGUMENT IS YOU CAN SPLIT AS MUCH AS YOU WANT, IT'S JUST WHEN YOU START TO OFFER THIS PARCEL FOR SALE THAT YOU HAVE TO FILE A NOTICE AND OBTAIN YOUR WHITE PAPER; IS THAT CORRECT?

MR. GOLDBERG: THAT'S CORRECT.

THE COURT: ALL RIGHT.

MR. GOLDBERG: I DON'T THINK ANYBODY WILL -- EVEN THE DISTRICT ATTORNEY WILL -- DISAGREE WITH THAT, BECAUSE I THINK W HAVE HEARD THAT FROM THE DEPARTMENT OF REAL ESTATE REPRESENTATIVE AS WELL AS MR. CHAGALA.

C

FROM THE VERY -- AT THE VERY -- THE MOST OBVIOUS MIS -- OMISSION OF INFORMATION IS THE FACT THAT THE WAY THIS IS PRESENTED TO YOUR HONOR, THIS CASE, THIS AFFIDAVIT IS PRESENTED TO YOU, IT IS INTENDED TO LEAD YOU TO BELIEVE THAT RONALD HERPOLSHEIMER, FORMERLY A SENIOR INVESTIGATIVE ASSISTANT TO THE FRAUD DIVISION, WAS A MEMBER OF THE PUBLIC WHO RESPONDED TO A NEWSPAPER ADVERTISEMENT OF PROPERTY THAT WAS OFFERED FOR SALE. AND I DON'T THINK THERE IS ANY OTHER INTERPRETATION OF THAT PIECE OF INFORMATION.

AND YOU WERE NOT ADVISED BY THE DISTRICT ATTORNEY'S OFFICE THAT HERPOLSHEIMER IS A PAID EMPLOYEE OF A LAW FIRM THAT'S INVOLVED IN EXTENSIVE LITIGATION WITH JEAN HARRIS, BOTH IN HIS ROLE OF CITY ATTORNEY OF POWAY AND THAT THE CLIENT OF TH LAW FIRM IS INVOLVED WITH LITIGATION WITH JEAN HARRIS IN HIS FAMILY CORPORATIONS PERSONALLY.

YOU ARE ALSO NOT ADVISED THAT THERE IS A GREAT DEA OF ANIMOSITY BETWEEN HERPOLSHEIMER'S EMPLOYER AND MR. HARRIS BECAUSE THEY HOLD MR. HARRIS RESPONSIBLE FOR THE FAILURE OF THEIR CLIENTS TO GET A SUBDIVISION MAP PASSED THROUGH THE CITY OF POWAY.

NOW, WHAT THAT IS IS THE TYPE OF INFORMATION THAT BEARS ON THE CREDIBILITY AND THE MOTIVATION OF A WITNESS. AND THINK THAT IN AND OF ITSELF IS SUFFICIENT, THE FAILURE OF THE D.A.'S INVESTIGATOR TO PUT BEFORE YOUR HONOR INFORMATION THAT WAS WITHIN HIS KNOWLEDGE, WITHIN THE KNOWLEDGE OF THE DISTRICT ATTORNEY'S OFFICE. THAT ERROR, THAT OMISSION, IS NOT JUST NEGLIGENCE, THAT'S RECKLESS, UNDER COOK, THEODORE, KURLAND, AN COBB, THE VARIOUS CASES THAT DEAL WITH THIS TYPE OF ISSUE OF

C

BEST AVAILABLE COPY

TRAVERSAL, THE FAILURE TO ADVISE YOUR HONOR SO HE COULD OBJECTIVELY LOOK AT THE FACTS AND OBJECTIVELY GO AHEAD AND DETERMINE THE CREDIBILITY AND DETERMINE PROBABLE CAUSE FOR THE ISSUANCE OF A WARRANT.

THE DEFENDANT IS ENTITLED TO THAT OBJECTIVE REASONING. THIS AFFIDAVIT, AS IT IS PRESENTED TO YOUR HONOR, IMPLIES SOMETHING COMPLETELY DIFFERENT THAN THE FACTS, AND THE FACTS BEING A VINDICTIVE CONFLICT BETWEEN PARTIES WHERE THEY ARE TRYING TO RETALIATE AGAINST JEAN HARRIS BECAUSE THEY THINK HE MISUSED HIS ROLE OF CITY ATTORNEY TO HURT THEIR CLIENT. AND BECAUSE OF THAT, THERE HAVE BEEN LAWSUITS FILED BETWEEN THE CLIENT -- BETWEEN THE CLIENTS AND THE CITY OF POWAY AND BETWEEN THEM AND JEAN HARRIS NAMING JEAN HARRIS AS THE CITY ATTORNEY.

IT ALSO FAILS TO ADVISE YOUR HONOR THAT THERE IS, IN FACT, A MOTIVATION BY HERPOLSHEIMER'S EMPLOYERS TO DAMAGE AND HURT JEAN HARRIS AND HAVE HIM REMOVED AS THE CITY ATTORNEY OF POWAY, BECAUSE IT'S CLEAR FROM THE TESTIMONY OF LORENZ AS TO THE WITCH HUNT IN POWAY, THE NEWSPAPER ARTICLES, THE VARIOUS THINGS, THAT HIS CLIENTS FEEL THAT HARRIS HAS HURT THEM AND DELAYED THEIR GETTING THEIR SUBDIVISION MAP. AND I THINK YOU CAN ASSUME IF HE WAS OUT OF THE WAY, SOMEHOW THAT THEY WOULD HAVE AN EASIER ROAD OF GETTING THEIR 750 ACRES SPLIT AND APPROVED THROUGH THE COUNTY AND THE CITY OF POWAY.

ANY ONE OF THOSE SUPPOSITIONS IS REASON ENOUGH THAT YOU SHOULD HAVE BEEN FULLY ADVISED. THAT'S THE LEAST THE DISTRICT ATTORNEY'S OFFICE OWES YOU IS FULL DISCLOSURE AND CANDOR ABOUT THEIR WITNESSES. IT'S THE SAME AS SAYING -- OF DISCLOSING TO YOU IF ONE OF THEIR INFORMANTS HAS A HORRENDOUS

BEST AVAILABLE COPY

CRIMINAL RECORD OR BEARS SOME PERSONAL ILL-WILL AGAINST THE PERSON THEY ARE INFORMING ON OR HAS SOME PERSONAL MOTIVATION TO SECURE THAT PERSON'S ARREST AND TO INFORM ON THEM. THAT TYPE O INFORMATION CLEARLY, UNDER MORRIS AND OTHER CASES, MUST BE DISCLOSED TO THE MAGISTRATE, THOSE FACTS THAT BEAR UPON THE MOTIVATION BEHIND AN INFORMANT.

AND ON THAT PARAGRAPH ALONE I THINK THIS WARRANT MUST FALL. FOR THAT REASON ALONE, THAT NEGLIGENT OMISSION, THA INTENTIONAL OMISSION, THAT RECKLESS DISREGARD, WHATEVER WE CALL IT, THIS WARRANT MUST FALL UNDER ANY STANDARD, STATE OR FEDERAL; CLEARLY BECAUSE IF WE USE THE FEDERAL STANDARD AND WE EXCISE, I COMES OUT THERE IS NOTHING IN IT. THERE IS NO INDICATION OF AN CRIMINAL ACTIVITY.

IF WE GET MORE SPECIFIC, YOU GET TO THE THE CRUX O IT, WHICH IS AT LINE 17, A FALSE STATEMENT, WHETHER NEGLIGENT, ACCIDENTAL, WHATEVER, A FALSE STATEMENT THAT BEARS TO THE VERY ISSUE HERE, AND THAT IS THAT THIS RONALD HERPOLSHEIMER RESPONDE TO A NEWSPAPER ADVERTISEMENT CONCERNING THE SALE OF LOTS BY ENVIRONCO.

AND WE HEARD FROM RONALD HERPOLSHEIMER. HE DIDN'T. HE CONTACTED AN AGENT AND HAD HIM CONTACT ANOTHER AGENT TO SEE IF THE PROPERTY WAS FOR SALE. HE NEVER RESPONDED TO ANY AD WHATSOEVER, NEWSPAPER AD.

WHY IS THAT RELEVANT? IT'S RELEVANT BECAUSE IT GOES TO THE ISSUE OF OFFERING FOR SALE TO THE GENERAL PUBLIC.

THERE IS ANOTHER FACTOR. THIS SECTION OF THE CODE DOES NOT REQUIRE A WHITE PAPER OR REPORT UNLESS ONE IS A MEMBER OF THE GENERAL PUBLIC AND THE PROPERTY IS OFFERED FOR SALE TO

C

BEST AVAILABLE COPY

HIM. AND THERE IS NOTHING IN THIS WARRANT EXCEPT AN INTENT TO MAKE YOUR HONOR THINK THAT RONALD HERPOLSHEIMER IS A MEMBER OF THE GENERAL PUBLIC WHO MADE SOME INQUIRIES ABOUT A PIECE OF PROPERTY THAT WAS SUBDIVIDED AND THERE WAS NO PAPERS ON FILE, WHEN IN FACT WE KNOW THAT'S NOT THE CASE, THAT HERPOLSHEIMER W NOT INTERESTED IN PROPERTY, WAS NOT INTERESTED IN BUYING PROPERTY, WAS NOT A MEMBER OF THE PUBLIC THAT THIS SECTION -- THESE SECTIONS ARE SOUGHT OR ENACTED TO PROTECT, THE GENERAL PUBLIC. HE IS A PERSON THAT IS ACTING AS AN INVESTIGATOR FOR INTERESTED CLIENT AND IS OUT GATHERING INFORMATION AND TRYING GATHER THOSE FACTS THAT CAN HELP HIS CLIENT AND HURT MR. HARRI

THAT ALL GOES TO THE ISSUE THAT THIS SHOULD HAVE BEEN PRESENTED TO THE MAGISTRATE, TO YOUR HONOR. THAT IS IMPORTANT. I THINK THAT IS ONE OF THE MOST IMPORTANT THINGS; AND I WOULD APPRECIATE IT IF IN ARGUING THIS IF I CAN ADDRESS EACH ARGUMENT SEPARATELY, BECAUSE I THINK ANY ONE OF THEM WOUL REQUIRE THIS WARRANT TO FALL UNDER A TRAVERSAL.

AND MAYBE YOUR HONOR WOULD WISH TO ALLOW MR. --

THE COURT: YOU TOLD ME THE OMISSION RELATES TO HERPOLSHEIMER'S BACKGROUND, INTEREST AND MOTIVE AND HIS EMPLOYMENT WITH LORENZ' FIRM. THE MISSTATEMENT IS THE FACT TH AFFIDAVIT SAYS HE RESPONDED TO A NEWSPAPER AD. IS THAT CORREC ANY OTHER OMISSIONS OR MISSTATEMENTS THAT YOU ARE RELYING ON?

MR. GOLDBERG: WELL, THE OMISSION -- I THINK THERE IS SOME ADMISSIONS THAT THE -- THAT THE SEARCH WARRANT, THAT THE PROPERTY TO BE SEARCHED, THE DESCRIPTIONS, ARE SUPPLIED BY THE INTERESTED PARTY, ONE HERPOLSHEIMER, RON HERPOLSHEIMER, THAT H SUPPLIES ALL THIS TO THE AFFIANTS.

C

THERE IS OMISSIONS OF TELLING YOU -- THAT YOU WERE NOT TOLD OF THE RELATIONSHIPS BETWEEN ALL THE PARTIES THAT ARE INTERESTED IN THIS CASE AND THE PROPERTY --

THE COURT: WHAT ARE YOU REFERRING TO SPECIFICALLY THERE ARE YOU TALKING ABOUT HERPOLSHEIMER'S --

MR. GOLDBERG: I AM TALKING ABOUT HERPOLSHEIMER'S RELATIONSHIP TO LORENZ, TO KLARFELD, TO LIGUORI, THE PEOPLE THA ARE INVOLVED IN SUITS AGAINST --

THE COURT: ALL RIGHT. I CAN CONSIDER THAT IN HERPOLSHEIMER'S MOTIVATION AND BACKGROUND, AND SO FORTH. ANY OTHER RELATIONSHIPS?

MR. GOLDBERG: WELL, YES. WELL, THE -- AND THE MOTIVATION, I THINK, HAS BEEN CLEAR TO YOUR HONOR, THE MOTIVATION BEHIND PRESENTING THE PACKAGE TO THE DISTRICT ATTORNEY'S OFFICE AND THE MOTIVATION OF THE PARTIES, PARTICULARLY HERPOLSHEIMER'S EMPLOYERS, TO HAVE A SEARCH WARRAN ISSUED TO GO AFTER JEAN HARRIS -- I THINK THAT IS CLEAR -- WHIC IS INFORMATION THAT IS -- IN TERMS OF MOTIVATION FOR THE INFORMANT, I THINK, MUST BE DISCLOSED. AND I WILL GIVE YOUR HONOR THE CASES IF YOU WANT TO.

IN TERMS OF PARTICULAR MISSTATEMENTS, YOUR HONOR, THE STATEMENT IN THE AFFIDAVIT BY MR. WAIGHT THAT HE PERSONALLY SPOKE WITH WITNESSES -- AND I THINK THE TESTIMONY OF MR. WAIGHT IS HE ONLY SPOKE WITH RONALD HERPOLSHEIMER, AND MAY HAVE TALKED ON THE PHONE AT SOME LATER TIME WITH A REPRESENTATIVE OF THE D.R.E., THE DEPARTMENT OF REAL ESTATE, REGARDING CHECKING, BUT THERE IS NO EVIDENCE THAT HE SPOKE WITH ANY OTHER WITNESSES, AN PEOPLE THAT HAD ANY PERSONAL KNOWLEDGE OF ANY OF THE FACTS

HEREIN.

THE FACT THAT WHEN HE -- WHEN MR. WAIGHT PUTS IN A SEARCH WARRANT, THE FACTUAL INFORMATION AS TO WHAT IT PROVES, HE DOES NOT DISCLOSE TO YOUR HONOR THE SOURCE OF THE FACTUAL INFORMATION AND HOW HE OBTAINED IT. HE SUPPOSEDLY VERIFIED ALL THE FACTUAL INFORMATION, BUT HE NEVER CHECKED WITH THE COUNTY RECORDER TO SEE IF DOCUMENTS WERE ACTUALLY RECORDED. HE NEVER DID ANYTHING EXCEPT ACCEPT THE DOCUMENTS THAT WERE PRESENTED TO HIS OFFICE BY MR. HERPOLSHEIMER AND THEN PASSED ON TO HIM -- EXCEPT, ACCORDING TO HIS TESTIMONY, MAYBE HE CHECKED THE COMPUTER. HE IS NOT SURE IF HE DID IT BEFORE OR AFTER.

I THINK THERE IS ANOTHER MISSTATEMENT, AND IN PARTICULARLY -- IT'S PARTICULARLY IMPORTANT BECAUSE IN PRESENTING THE AFFIDAVIT TO YOUR HONOR AND PRESENTING THE ACCOMPANYING DOCUMENTS THERE IS A REPRESENTATION THAT THE EAGLES NEST, THE BROCHURE THAT'S DESCRIBED AS EXHIBIT Q, I BELIEVE, THERE IS AN IMPLIED REPRESENTATION THAT THAT IS OBTAINED SOMEHOW FROM HERPOLSHEIMER AS EVIDENCE OF THE OFFERING TO SELL.

SPECIFICALLY, IN THE WARRANT HE REFERRED -- HE REFERS TO AS AN EVIDENCE OF THE OFFERING TO SELL BY NEWSPAPER AD, EXHIBIT P -- PARDON ME, I MEANT P, NOT Q -- AND I THINK IT'S A MISSTATEMENT. AND MR. WAIGHT SAYS TO THE COURT IN THE WARRANT, "WE ARE TALKING ABOUT HERPOLSHEIMER, WHO TOLD ME THAT HE RESPONDED TO A NEWSPAPER ADVERTISEMENT CONCERNING THE SALE OF LOTS BY ENVIRONCO TO A DEVELOPMENT CALLED EAGLES NEST. SEE EXHIBIT P."

THE IMPLICATION THERE GIVEN TO THE COURT IS THAT WHEN HE RESPONDED, HE GETS THIS BROCHURE IN RESPONSE TO THE AD

C

BEST AVAILABLE COPY

REGARDING THE SALE OF THESE PROPERTIES, AND, YOUR HONOR, THAT'S NOT THE FACTS. THOUGH HE SAYS THAT AND TESTIFIES TO THAT, YOU HEARD FROM MR. HERPOLSHEIMER. MR. HERPOLSHEIMER TOLD WAIGHT THAT THE BROCHURE CAME FROM HERPOLSHEIMER'S OWN CLIENT.

THERE IS ALSO NO POSSIBILITY OF VERIFYING THE CONNECTION OF THE PROPERTY SOUGHT TO BE DESCRIBED IN THIS BROCHURE AND CONNECTING THAT TO THE PROPERTY THAT IS REPRESENTE IN THE REST OF THE TRANSACTIONS, THE REST OF THE DOCUMENTS.

IF YOUR HONOR WILL LOOK AT THIS, THE ONLY CONNECTION BETWEEN THIS BROCHURE AND ALL THOSE OTHER DOCUMENTS IS THE NAME OF ENVIRONCO PROPERTIES. A MAP. DO WE SEE A MAP? WE SEE A MAP THAT INDICATES A PIECE OF PROPERTY THAT COULD COVE SEVERAL THOUSAND ACRES SOMEWHERE, AN OLD COACH ROAD IN THE NORT COUNTY AREA. THERE IS NO WAY OF POINTING WHETHER THIS IS THE PROPERTY OF MR. HARRIS OR THE PROPERTY OF MR. LIQUORI, WHICH IS RIGHT NEXT DOOR, OR MR. KULJIS, WHICH IS RIGHT NEXT DOOR -- THA THEY SPLIT UP, WHICH IS ALL AROUND IT.

IN TERMS OF THE DESCRIPTION IN THE BROCHURE, THE DESCRIPTION JUST TALKS ABOUT PROPERTY IN THE NORTH COUNTY AREA, IN SAN DIEGO'S NORTH COUNTY WITH A MAGNIFICENT EAGLE'S EYE VIEW. THERE IS ABSOLUTELY NO DESCRIPTION OF THIS PROPERTY IN EAGLES NEST TYING IT TO THE DOCUMENTS THAT HAVE BEEN SUBMITTED AS EXHIBITS IN SUPPORT OF THE AFFIDAVIT FOR THE SEARCH WARRANT.

BUT BECAUSE OF THE WAY IT IS INCLUDED IN THIS WARRANT AS EXHIBIT P, REFERRING TO THE NEWSPAPER AD, YOUR HONOR IS SUPPOSED TO BELIEVE THAT THIS ADVERTISEMENT, THIS DOCUMENT, CAME AS A RESULT OF A NEWSPAPER AD OF ENVIRONCO OFFERING PROPERTIES OR LOTS FOR SALE THAT THEY HAVE NOT RECEIVED OR

C

APPLIED FOR A PUBLIC REPORT ON OR GIVEN NOTICE ON. AND I MAINTAIN THAT THERE IS ACTUALLY NO CONNECTION TO IT. THERE IS NO WAY FOR YOUR HONOR TO KNOW THAT.

AT THE TIME YOU ISSUED THE WARRANT, YOU ARE ASSUMING WHEN SOMEBODY REFERS TO AN EXHIBIT AS EVIDENCING SOMETHING THAT WAS RECEIVED OR SOMETHING THAT CAME AS A RESULT OF THEIR RESPONSE TO A NEWSPAPER AD, IT'S A LOGICAL IMPLICATION THAT THAT BROCHURE CAME TO MR. HERPOLSHEIMER IN RESPONSE TO HIS -- AS A RESULT OF HIS RESPONDING TO A NEWSPAPER AD WHICH ENVIRONCO PLACED OFFERING LOTS FOR SALE.

EXCUSE ME ONE OTHER SECOND.

NOTE: DISCUSSION BETWEEN COUNSEL FOR THE DEFENSE.

MR. GOLDBERG: I WOULD INDICATE ALSO, YOUR HONOR, THERE IS A NEGLIGENT MISSTATEMENT IN THE SEARCH WARRANT AT PAGE 4 WHE THEY TALK ABOUT THERE IS CURRENTLY NO RECORD OF A SUBDIVISION MAP OR OF ANY INTENT TO OBTAIN A SUBDIVISION MAP. THAT LANGUAG IS COMPLETELY SUPERFLUOUS TO THIS WARRANT. THERE IS NOTHING THAT ONE MUST DO, NO LAW, NO REQUIREMENT, TO INTEND TO GIVE ANY NOTICE OF A SUBDIVISION MAP OR OBTAIN A SUBDIVISION MAP OR ATTEMPT TO OBTAIN A SUBDIVISION MAP.

WHAT WE DO IS WE KNEW THAT THERE WERE PARCEL MAPS FOR THE DIVISION OF THAT PROPERTY, BUT THAT -- IT MAKES THE COURT THINK IN THAT PARAGRAPH THAT PROPERTY HAS BEEN DIVIDED AI THERE HAS BEEN NO AUTHORIZATION FOR IT, THERE HAS BEEN NO LEGAI DIVISION OF PROPERTY OBTAINED BY ENVIRONCO PROPERTIES.

AND IF YOU USE THAT -- LOOK AT THAT STATEMENT, YOI LOOK AT PAGE 2, WHICH TALKS ABOUT THE SPLIT OF PARCELS BY

C

ENVIRONCO PROPERTIES, THIS STATEMENT THAT THERE IS NO RECORD OF THE SUBDIVISION MAP MAKES IT APPEAR AS IF ALL THE DIVISIONS OF PROPERTIES -- THAT'S DEPICTED ON PAGE 2 -- WAS WITHOUT ANY TYPE OF LAWFUL PROCEDURE. AND I BELIEVE THAT IS INCORRECT, AND THAT IS NOT THE LAW.

THE ONLY THING THAT COMES EVEN CLOSE TO BEING -- TO DESCRIBING TO THE COURT THE ACTUAL ILLEGALITY OF IT, IF ANY, IS THE WORDS "OR OF ANY INTENT TO SELL SUBDIVISION LAND." AND WHAT HE SAID IS THERE IS NO RECORD OF ANY INTENT TO SELL SUBDIVISION LAND.

I WOULD INDICATE, YOUR HONOR, THAT THE RECORD OF INTENT TO SELL SUBDIVISION LAND IS NOT REQUIRED. THAT DOESN'T DESCRIBE TO THE COURT THAT SUB -- THERE IS NO REQUIREMENT FOR NOTICE TO INTENT TO SELL SUBDIVISION LAND UNTIL IT'S OFFERED TO THE GENERAL PUBLIC. THERE IS NO REQUIREMENT THAT THERE BE A PUBLIC REPORT FILED OR A NOTICE OF INTENT TO BE FILED, IF IT'S TO BE SOLD IN A BULK SALE, IF IT'S TO BE SOLD IN A MANNER OTHER THAN TO THE GENERAL PUBLIC.

MR. GOLDBERG: COULD I HAVE ONE MORE SECOND, PLEASE?

I HAVE NO FURTHER QUESTIONS -- NO FURTHER COMMENTS YOUR HONOR, AT THIS POINT.

THE COURT: MR. SHINNICK?

MR. SHINNICK: YES, YOUR HONOR.

THE PEOPLE WILL ASK THE COURT TO CONSIDER TWO CASES IN ITS RULING ON THIS, AND THESE ARE THE CASES THAT WE RELY ON. THE FIRST IS PEOPLE V. MESA, M-E-S-A, AT 14 CAL. 3RD , 466.

MESA STANDS FOR THE PROPOSITION THAT A WARRANT IS TO BE READ WITH COMMON SENSE, BASICALLY A RECOGNITION OF THE

C

FACT THAT ANY AFFIDAVIT, ANY WARRANT, IS NOT DRAFTED BY A HEMINGWAY. ANY AFFIDAVIT AND ANY WARRANT SIMPLY MUST BE READ WITH SOME COMMON SENSE AND IS PRESUMED TO BE CORRECT.

THE SECOND CASE THAT WE WILL RELY ON WAS MENTIONED BY MR. GOLDBERG, IS PEOPLE V. KURLAND, K-U-R-L-A-N-D, AT 28 CAL. 3RD 376.

THE COURT: I AM FAMILIAR WITH THE KURLAND CASE. I HAVE IT HERE.

MR. SHINNICK: THANK YOU, YOUR HONOR.

WE BASICALLY HAVE A THREE-STEP ANALYSIS THAT I WANT TO MAKE. FIRST IS THERE IS ZERO EVIDENCE THAT THERE IS AN INTENTIONAL OR RECKLESS EITHER MISTAKE OR OMISSION OR MISSTATEMENT OR ANYTHING. THERE IS NO EVIDENCE THAT ANYTHING THAT WAS LEFT OUT FROM THE WARRANT ACCORDING TO WHAT THE DEFENSE WOULD RATHER HAVE IN THE WARRANT OR ANYTHING THAT'S IN THE WARRANT WAS -- AND INCORRECT WAS INTENTIONALLY DONE.

I THINK THE COURT HAS HAD AN OPPORTUNITY TO EXAMINE -- TO VIEW THE CREDIBILITY OF MR. WAIGHT, VIEW HIM IN COURT AND ALSO TO LISTEN TO KIND OF THE PROCESS, OF ROUGH DRAFT, TO MORE INFORMATION, AND SO FORTH, THAT WENT INTO THE WARRANT.

THE COURT: TELL ME WHY IT'S NOT RECKLESSLY INACCURATE.

MR. SHINNICK: I THINK WITH RESPECT TO THE HERPOLSHEIMER THING, IS THAT THE --

THE COURT: YES, WITH RESPECT TO NOT DISCLOSING HERPOLSHEIMER'S RELATION TO THE CLIENT OF LORENZ' FIRM, THE FAC THAT HE WAS PAID BY THAT CLIENT, THE FACT OF LITIGATION THAT WA GOING ON, THE FACT THAT THIS BROCHURE WAS OBTAINED FROM HIS CLIENT, AND NOT AS PART OF AN OFFER TO HIM, THOSE ITEMS.

BEST AVAILABLE COPY

MR. SHINNICK: OKAY.

I THINK WHAT MR. WAIGHT -- I THINK A FAIR ARGUMENT OF WHAT HE WAS DOING IS HE EXAMINED THE BULK OF THIS AFFIDAVIT AND THAT IT DEALT WITH PUBLIC RECORDS. THERE WAS NOTHING THAT MR. HERPOLSHEIMER COULD DO --

THE COURT: LET ME ASK --

MR. SHINNICK: -- THAT WOULD ALSO AFFECT --

THE COURT: -- IF YOU TAKE OUT THE PARAGRAPH BEGINNING O LINES 15 THROUGH 21 ON PAGE 4, IS IT YOUR CONTENTION THAT THIS DOCUMENT WOULD STILL BE SUFFICIENT TO SUPPORT THE WARRANT? ISN'T THAT THE ONLY EVIDENCE THAT THESE LOTS WERE OFFERED FOR SALE?

MR. SHINNICK: YES, YOUR HONOR, IT IS, IN THE WARRANT.

THE COURT: IF WE TAKE THAT PARAGRAPH OUT, THIS WARRANT IS DEFICIENT, ISN'T IT?

MR. SHINNICK: YOUR HONOR, I DON'T THINK THE COURT SHOUL TAKE THAT PARAGRAPH OUT.

THE COURT: WELL, THAT'S NOT MY QUESTION. IF YOU TAKE I OUT, ISN'T THIS WARRANT DEFICIENT?

MR. SHINNICK: WITHOUT THAT PARAGRAPH, WITHOUT THAT PARAGRAPH, I DON'T BELIEVE THAT THERE IS OTHER EVIDENCE IN THE WARRANT THAT THE PROPERTIES WERE OFFERED FOR SALE.

THE COURT: RIGHT.

MR. SHINNICK: THAT'S CORRECT.

THE COURT: ISN'T THAT ENTIRE PARAGRAPH BASED UPON MR. HERPOLSHEIMER AND HIS REPRESENTATION?

MR. SHINNICK: NOT ENTIRELY, YOUR HONOR. I THINK THAT THE BROCHURE ITSELF IS THE PHYSICAL CORROBORATION OF THE FACT

C

BEST AVAILABLE COPY

WHEN YOU CONSIDER ALL THE INFORMATION THAT WAIGHT KNEW -- MR. SAMSON KNEW -- REGARDING THE PREVIOUS INVOLVEMENT AND CONFLICT BETWEEN MR. HARRIS AND HERPOLSHEIMER'S EMPLOYERS AND ALSO SOME OF THE OBVIOUS CONTRADICTIONS BETWEEN HERPOLSHEIMER'S TESTIMONY AND WAIGHT, IT MAKES THE OMISSION BLATANT. AND I THINK IT'S CLEAR THAT IT WAS RECKLESS. THERE CAN BE NO OTHER WAY TO VIEW IT. IT WAS NOT AN ACCIDENT. IT WAS NOT NEGLIGENT. IT WAS NOT INCLUDED. AND THIS COURT SHOULD HAVE HAD THE BENEFIT OF EVALUATING THAT AND SAYING WITH ALL THAT CONFLICT AND ALL THIS LITIGATION GOING ON, IS HERPOLSHEIMER -- CAN WE REALLY TRULY TRUST HIM? IS HE REALLY CREDIBLE?

AND TO GET TO ONE MORE THING THAT MR. SHINNICK DIDN'T EVEN COMMENT ON, AND THAT IS HERPOLSHEIMER DENIES EVER SAYING TO WAIGHT THAT HE RESPONDED TO A NEWSPAPER AD, WHICH IS THE WAY THAT MR. WAIGHT TRIES TO PRESENT -- OR THE LAW CLERK OR WHOEVER TYPED IT UP -- TRIES TO PRESENT TO THE COURT THAT THE PROPERTY WAS OFFERED FOR SALE. THERE IS EVEN A DENIAL OF THAT FACT.

THE COURT: ALL RIGHT. THANK YOU, GENTLEMEN.

THE COURT HAS LOOKED AT THE HOLDING IN KURLAND AND ALSO THE HOLDING IN COBB.

KURLAND SETS FORTH THE PROPER ANALYSIS TO BE USED IN THESE CASES WITH RESPECT TO OMISSIONS, AND THE FIRST TEST THAT THE COURT MUST EXAMINE IS WHETHER OR NOT THE OMISSION IS MATERIAL.

IN THIS INSTANCE, IF I EXAMINE THE AFFIDAVIT, THE ONLY EVIDENCE THAT THESE LOTS WERE BEING OFFERED FOR SALE IS EXHIBIT P AND LINES 15 THROUGH 21 ON PAGE 4. ALL OF THAT

INFORMATION COMES FROM MR. HERPOLSHEIMER.

WITH RESPECT TO OMISSIONS, THE TWO OMISSIONS THAT THE COURT FINDS ARE SIGNIFICANT AND MATERIAL ARE CONCERNING MR. HERPOLSHEIMER'S BACKGROUND AND THE FACT THAT THIS BROCHURE CAME FROM HIS CLIENT. THE TESTIMONY THAT'S BEEN PRESENTED TO THIS COURT SHOWS THAT MR. HERPOLSHEIMER WAS EMPLOYED BY MR. LORENZ' FIRM. HE WAS BEING PAID BY THAT FIRM. THAT FIRM HAD A CLIENT THAT WAS INVOLVED IN LITIGATION WITH THE CITY OF POWAY, AND IN THAT LITIGATION MR. HARRIS WAS NAMED AS A DEFENDANT.

THE EVIDENCE ALSO SHOWS THAT MR. HARRIS WAS THE CITY ATTORNEY FOR THE CITY OF POWAY AND THE COMPLAINT, WHICH MR. LORENZ' FIRM WAS HANDLING, ALLEGED THAT MR. HARRIS HAD A CONFLICT OF INTEREST. THE COMPLAINT WAS FILED IN ORDER TO ATTEMPT TO FORCE THE CITY OF POWAY TO APPROVE A SUBDIVISION MAP FOR ONE OF MR. LORENZ' CLIENTS. ACTUALLY, MR. LORENZ TESTIFIED THAT HIS CLIENT WAS MIKE KLARFELD, A LOS ANGELES ATTORNEY, WHO IN TURN REPRESENTED MR. LIGUORI'S COMPANY. AND IT'S MY UNDERSTANDING THAT IT'S MR. LIGUORI AND HIS COMPANY -- THEY WERE SEEKING APPROVAL OF THE SUBDIVISION MAP.

THIS LITIGATION RESULTED IN, TO SAY THE LEAST, HARD FEELINGS FROM THE EVIDENCE PRESENTED, AND THERE WAS SOME WORDS EXCHANGED, AND SO FORTH.

THIS IS THE TYPE OF EVIDENCE THAT THE MAGISTRATE NEEDS TO EXAMINE TO DETERMINE WHETHER OR NOT A PERSON SUPPLYING INFORMATION FOR A WARRANT IS CREDIBLE, WHETHER OR NOT THERE IS ANY BIAS OR MOTIVE, WHICH WOULD GIVE RISE TO THE POSSIBILITY OF FALSE INFORMATION.

ALL THE INFORMATION THAT I HAVE DESCRIBED WAS PROVIDED BY MR. LORENZ' OFFICE THROUGH MR. HERPOLSHEIMER TO THE DISTRICT ATTORNEY'S OFFICE. MR. LORENZ SAID THAT MR. SAMSON HAD KNOWLEDGE OF THE LITIGATION. IN FACT, MR. LORENZ INDICATED THAT HE WANTED TO PROVIDE FULL DISCLOSURE TO THE DISTRICT ATTORNEY'S OFFICE SO THEY COULD TAKE INTO ACCOUNT BASICALLY ANY BIAS OR MOTIVE THAT HIS CLIENT OR HIS FIRM MIGHT HAVE IN PROVIDING THIS INFORMATION SO THAT THE DISTRICT ATTORNEY'S OFFICE HAD THAT INFORMATION.

IN ADDITION, MR. HERPOLSHEIMER TESTIFIED THAT WITH RESPECT TO THE BROCHURE HE INFORMED THE DISTRICT ATTORNEY'S OFFICE THAT THAT HAD BEEN RECEIVED FROM HIS CLIENT. WITH THIS INFORMATION IN HAND IN THE DISTRICT ATTORNEY'S OFFICE, THEY CHOSE TO PUT THE AFFIDAVIT TOGETHER WITHOUT INCLUDING ANYTHING ABOUT THE INFORMATION OR ANY REFERENCE AT ALL OF MR. HERPOLSHEIMER'S POSITION, MOTIVE, POSITION OF HIS EMPLOYER, OF THE EMPLOYER'S CLIENTS.

SO I FIND THE OMISSIONS TO BE MATERIAL SINCE THEY GO TO HIS MOTIVE AND BIAS, AND HIS INFORMATION IS THE ONLY INFORMATION RELATING TO THE INTENT TO SELL.

AND I ALSO FIND THAT THE DISTRICT ATTORNEY ACTED RECKLESSLY, AND IT WAS THE AFFIANT THAT WAS RECKLESS IN NOT PUTTING THE INFORMATION IN THE AFFIDAVIT; AND THE AFFIDAVIT IS RECKLESSLY INACCURATE AS THAT TERM IS UTILIZED IN KURLAND, AND THE MOTION TO SUPPRESS WILL BE GRANTED.

NOW, GENTLEMEN, SINCE THE MOTION IS GRANTED, THE QUESTION IS WHAT REMAINS OF THE CASE, AND I WILL HEAR FROM YOU, MR. SHINNICK.

Copy

C323

IN THE MUNICIPAL COURT OF THE SAN DIEGO JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

DEPARTMENT NUMBER 6 BEFORE HON. E. MAC AMOS, JR., JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
PLAINTIFF,	)	PRELIMINARY EXAMINATION
V.	)	CR _____
JEAN LEONARD HARRIS,	)	F 79822 A 71659
DEFENDANT.	)	

REPORTER'S TRANSCRIPT

SAN DIEGO, CALIFORNIA

NOVEMBER 7, 1983

VOLUME III

COUNSEL APPEARING:

FOR THE PLAINTIFF: EDWIN L. MILLER, JR.
DISTRICT ATTORNEY
BY: DUANE E. SHINNICK
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: CHARLES L. GOLDBERG
ATTORNEY AT LAW

DUANE E. RANKIN, CSR 1502
MUNICIPAL COURT REPORTER
SAN DIEGO COUNTY COURTHOUS
SAN DIEGO, CALIFORNIA 921(

EXHIBITS.

NOTE: THERE WAS A SHORT RECESS.

THE COURT: GENTLEMEN, I HAVE REVIEWED THE ADDITIONAL DOCUMENTS AND TESTIMONY THAT WAS RECEIVED TODAY.

FIRST OF ALL, STARTING WITH THE DISTRICT ATTORNEY' REQUEST TO RECONSIDER MY PREVIOUS RULING, I AM STILL OF THE OPINION THAT THERE WAS A RECKLESS DISREGARD FOR THE TRUTH OF TH AFFIDAVIT IN THAT IT FAILED TO PUT IN THE BACKGROUND WITH RESPECT TO MR. HERPOLSHEIMER AND ALSO FAILED TO INDICATE THAT THE BROCHURE, WHICH WAS ATTACHED, WAS OBTAINED FROM HIS CLIENT AND WAS NOT OBTAINED BY HIM AS PART OF THE OFFER.

I ALSO FIND THAT THAT MATERIAL -- EXCUSE ME -- THA INFORMATION WAS MATERIAL, BECAUSE IT REFLECTED UPON THE CREDIBILITY OF MR. HERPOLSHEIMER, AND IT'S THAT ONE PARAGRAPH I THE AFFIDAVIT ON PAGE 4, LINES 15 THROUGH 21, THAT MUST BE USED TO SHOW THAT THE PROPERTY WAS FOR SALE OR INTENDED FOR SALE. S WITH RESPECT TO CHANGING MY PRIOR RULING IN THAT REGARD, THE MOTION IS DENIED.

NOW, THAT LEAVES ME WITH THE APPLICATION OF PROPOSITION 8. I AM OF THE OPINION THAT THE HOLDING IN SMITH I' CORRECT, THAT IT ONLY AFFECTS CRIMES AFTER THE DATE OF THE PROPOSITION. THAT MEANS THAT I FIND THAT PROPOSITION 8 IS APPLICABLE.

WITH RESPECT TO COUNTS 1 AND 2, BUT IS NOT APPLICABLE WITH RESPECT TO COUNT 3, JUST AS A RESULT, THE PROPE ANALYSIS IN COUNT 3 WILL BE WHAT I WILL REFER TO AS THE KURLAND ANALYSIS; HOWEVER, THERE MUST BE A DIFFERENT ANALYSIS WITH RESPECT TO COUNTS 1 AND 2, AND IN THAT REGARD THE COURT IS

REQUIRED TO EXAMINE FRANKS AND THE FEDERAL CASES WHICH INTERPRE
FRANKS.

THE COURT'S OPINION IS THAT THE FRANKS CASE REQUIRES THAT THE AFFIDAVIT BE RETESTED IN LIGHT OF THE OMISSIONS. IN RETESTING THE AFFIDAVIT THE COURT WOULD CONSIDE THE BACKGROUND OF MR. HERPOLSHEIMER AS FAR AS IT RELATES TO MR. LORENZ' OFFICE AND MR. LORENZ' OFFICE RELATION TO ADVERSE PARTIES AND THE FACT THAT MR. LORENZ' OFFICE WAS REPRESENTING THE CLIENTS INVOLVED IN THE LITIGATION IN WHICH IT WAS ALLEGED THAT MR. HARRIS, THE DEFENDANT IN THIS CASE, HAD A CONFLICT OF INTEREST.

THE COURT WOULD ALSO CONSIDER THE OMISSION THAT TH BROCHURE IN QUESTION, EXHIBIT P, WAS NOT OBTAINED IN THE SCOPE AND COURSE OF THE OFFER THAT MR. HERPOLSHEIMER RECEIVED. BUT EVEN IF I CONSIDER AND PUT IN THOSE OMISSIONS, WHICH I AM NOW REQUIRED TO DO, I FEEL THAT THE AFFIDAVIT IS SUFFICIENT. THE AFFIDAVIT DOES INDICATE THAT MR. HERPOLSHEIMER WAS OFFERED ONE OF THE ABOVE DESCRIBED PARCELS FOR SALE. THAT'S ON PAGE 4 AT LINES 20 THROUGH 21. THAT IS CORRECT. AND EVEN IF I PUT IN TH OTHER OMISSIONS, I BELIEVE THAT WITH THOSE ADMISSIONS THE AFFIDAVIT WOULD BE SUFFICIENT TO SUPPORT PROBABLE CAUSE FOR THE SEARCH WARRANT.

SO WITH RESPECT TO COUNTS 1 AND 2, NONE OF THE DOCUMENTS SEIZED PURSUANT TO THE SEARCH WARRANT WILL BE SUPPRESSED.

THAT LEAVES US WITH COUNT 3.

HERE THE COURT FINDS THAT SINCE THE CRIME WAS COMMITTED ALLEGEDLY BEFORE THE PROPOSITION 8 WAS ENACTED, THAT

THE BURLAND ANALYSIS IS PROPER. IN THAT REGARD THE COURT NOW MUST EXAMINE THE DOCTRINE OF INEVITABLE DISCOVERY. THERE ARE CERTAIN DOCUMENTS, HOWEVER, THAT WERE ADMITTED THAT THE PEOPLE HAVE NOT SHOWN WOULD HAVE BEEN DISCOVERED INEVITABLY, AND IF I COULD SEE DOCUMENTS, 18, 23, 26 AND 27 AND 28, --

THE CLERK: 23? 26? 27 AND 28?

THE COURT: YES. AND 18.

NOTE: DOCUMENTS HANDED TO THE COURT.

THE COURT: ALL RIGHT. WITH RESPECT TO DOCUMENTS PUT IN EVIDENCE BY 18, 23, 26, 27 AND 28, THE PEOPLE HAVE NOT MET THEIR BURDEN SHOWING INEVITABLE DISCOVERY, AND THOSE DOCUMENTS WILL BE SUPPRESSED.

NEXT, THE COURT TURNS ITS ATTENTION TO THE TESTIMONY OF MR. KURETICH AND THE INFORMATION RECEIVED RELATIVE TO THAT GENTLEMAN. AND IN REVIEWING THE AFFIDAVIT THAT WAS SUBMITTED, THE COURT NOTES THAT HIS IDENTITY WAS KNOWN. HE IS SPECIFICALLY REFERRED TO IN THE AFFIDAVIT ON PAGE 2 AND ALSO ON PAGE 3. THE COURT FINDS THAT DISCOVERY OF MR. KURETICH AND THE INFORMATION RESULTING FROM MR. KURETICH WOULD HAVE BEEN INEVITABLY DISCOVERED, SO NO SUPPRESSION WILL TAKE PLACE WITH RESPECT TO THAT TESTIMONY.

A MORE DIFFICULT PROBLEM ARISES WITH RESPECT TO THE INTRODUCTION OF THE EVIDENCE FROM MR. BUMFORD. AND WERE IT FOR THE TESTIMONY OF MR. WAIGHT ALONE, I DON'T FEEL THAT THE PEOPLE WOULD HAVE MET THEIR BURDEN. HOWEVER, THERE ARE CERTAIN DOCUMENTS WHICH DO SUPPORT THE THEORY THAT MR. BUMFORD WOULD HAVE INEVITABLY BEEN DISCOVERED. IN PARTICULAR, THE COURT RELIES ON EXHIBIT 41, WHICH IS THE MEMORANDUM FROM MR. SHINNICK

TO MR. WAIGHT. IN PARAGRAPH ONE OF THAT MEMORANDUM MR. WAIGHT IS DIRECTED TO CONTACT AND INTERVIEW THE PERSON WHO BOUGHT THE PARCEL OF LAND FROM EAGLES NEST RECENTLY. THE EVIDENCE BEFORE THE COURT IS THAT THIS MEMORANDUM WAS DIRECTED TO OR IN THE HANDS OF MR. WAIGHT PRIOR TO THE TIME THE DOCUMENTS RECEIVED FROM THE SEARCH WARRANT WERE REVIEWED.

IN ADDITION, THERE IS A PUBLIC DOCUMENT CONSISTING OF A DEED OF TRUST, WHICH IS EXHIBIT 43, WHICH DOES SHOW THE NAME OF JAMES AND JANET BUMFORD AND SHOWS AN ADDRESS OF 10290 AVENIDA DE LA CANTINA, SAN DIEGO, CALIFORNIA. THE COURT HAS ALSO BEFORE IT EVIDENCE THERE WAS A COMPUTER TERMINAL AVAILABLE IN THE DISTRICT ATTORNEY'S OFFICE AND THAT THE PRACTICE WAS TO USE THAT COMPUTER TERMINAL IN THE INFORMATIONAL RESPECT. MR. BUMFORD WAS IN FACT IN THAT TERMINAL. WITH THAT IN MIND, THE COURT HAS CONCLUDED THAT THE PEOPLE HAVE MET THEIR BURDEN AND THAT THE INFORMATION WITH RESPECT TO MR. BUMFORD WOULD HAVE INEVITABLY BEEN DISCOVERED, AND THAT WILL ALSO BE ADMITTED.

ALL RIGHT. WHAT ADDITIONAL EVIDENCE OR MOTIONS DO YOU HAVE, MR. GOLDBERG?

MR. GOLDBERG: WE DO HAVE A MOTION FOR RECUSAL. I WOULD LIKE TO HAVE THAT HEARD WEDNESDAY MORNING WHEN WE RESUME, IF WE CAN PURSUE THAT.

THE COURT: IS THERE ANYTHING ELSE OTHER THAN MOTION FOR RECUSAL?

MR. GOLDBERG: WE DO ANTICIPATE PUTTING ON SOME DEFENSE AT THE VERY LEAST AND PROBABLY DOING THE ESTEYBAR MOTION AGAIN IN LIGHT OF THE COURT'S RULINGS AND THE DISCOVERY. BUT I THINK

BEST AVAILABLE COPY

LO ED FILED

86 SEP 5 AM : 24 86 SEP 10 A 9 : 05

DISTRICT OF CA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEAN LEONARD HARRIS, Plaintiff, v. DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, etc., et al., Defendants.	Case No. 84-0767-T(M) FINDINGS OF FACT AND CONCLUSIONS OF LAW Hearing on Motions for Summary Judgment DATE: June 23, 1986 TIME: 10:30 a.m.

The motions of Defendants Anthony Samson, Duane Shinnick, Harold Waight, M. James Lorenz, Ronald Herpolsheimer, and Myron Klarfeld for summary judgment came on regularly for hearing before this Court on June 23, 1986, at 10:30 a.m. Plaintiff Jean Leonard Harris appeared through his attorney of record, George Weingarten. Defendants Anthony Samson, Duane Shinnick, and Harold Waight appeared through their attorneys of record, Lloyd M. Harmon, Jr., County Counsel, by Paul N. Bruce, Deputy, and Eugene P. Kenny, Deputy. Defendants M. James Lorenz and Ronald Herpolsheimer appeared through their attorneys of record, Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson &

Casey, by Michael L. Lipman and Paul E. Pierce, Jr. Defendant Myron Klarfeld appeared through his attorneys of record, Post, Kirby, Noonan & Sweat, by Gregory A. Post.

The Court reviewed and considered the exhibits, the oral and documentary evidence, the declarations on file, the pleadings on file, and the arguments advanced by counsel at the hearing. The Court finds that the defendants' motions for summary judgment in their favor as to all claims against them should be granted and issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. In or about January or February 1983 defendant Lorenz contacted defendant Deputy District Attorney Samson regarding certain documents in his possession evidencing violations of California Business and Professions Code Section 11000 et seq. by plaintiff Harris. Defendant Samson, as part of an independent investigation conducted by the District Attorney's office, reviewed the documents and came to the conclusion that there was reasonable cause to believe that plaintiff had violated the Subdivision Map Act and the aforementioned Business and Professions Code sections.

2. Upon the completion of defendant Samson's review of said documents he, on or about March or April 8 of 1983, assigned the case to defendant Deputy District Attorney Duane Shinnick for possible prosecution. Defendant Shinnick, after a further independent review of the relevant documents and research into the statutes involved, determined that a

D

prima facie case existed that plaintiff had engaged in an illegal subdivision and was offering the sale of such illegally subdivided lots to the public in violation of the California Business and Professions Code. At this point the District Attorney's office investigation had become particularly focused on plaintiff Harris and his participation in the illegal subdivision and offer to sell. Based upon the existence of the prima facie case, defendant Shinnick, along with defendant District Attorney Investigator Harold Waight, who was at all times acting upon defendant Shinnick's express directives, drafted and prepared an affidavit in support of search warrant of plaintiff's office and residence.

3. The Municipal Court of the State of California, San Diego Judicial District, issued the search warrant on or about June 15, 1983. Plaintiff Harris' office and residence were then searched and certain documents seized.

4. Defendants Lorenz, Herpolsheimer and Klarfeld did not participate in any manner in (i) the District Attorney's office decision to seek a search warrant for plaintiff Harris' office and residence, (ii) the preparation or drafting of the affidavit in support of search warrant, (iii) the preparation or drafting of the search warrant, (iv) the issuance of the search warrant, or (v) the execution of the search warrant.

5. On or about August 31, 1983, the District Attorney's office filed a felony criminal complaint against plaintiff

D

Harris in the Municipal Court of the State of California, San Diego Judicial District, Case No. F79822. Defendants Lorenz, Herpolsheimer and Klarfeld did not participate in any manner in the District Attorney's decision to file charges against plaintiff Harris.

6. On October 26, 1983 plaintiff Harris filed a motion in the Municipal Court to suppress evidence obtained by the execution of the search warrant and on or about October 27, 1983, plaintiff filed a subsequent motion in the Municipal Court to transverse the search warrant. Plaintiff Harris' motion to suppress and to transverse were heard in conjunction with the preliminary hearing conducted on November 1, 2 and 7, 1983, in the San Diego Municipal Court before the Honorable E. Mac Amos.

7. Municipal Court Judge Amos, after affording plaintiff Harris a full and fair opportunity to litigate the issues of whether there was probable cause to issue the search warrant and whether plaintiff's Fourth Amendment rights had been violated by the search of his office and residence, found that there was probable cause to issue the search warrant and that plaintiff's civil rights had not been violated by the search.

8. On or about November 14, 1983, plaintiff Harris voluntarily entered a plea of guilty to count three of the criminal complaint, which was subsequently reduced to a misdemeanor by consent of the parties. Plaintiff Harris

D

also, as part of the plea, voluntarily waived his appellate rights under California Penal Code Section 1538.5.

9. At no time did any of the defendants engage in a common plan or scheme to deprive plaintiff of his civil rights by falsely alleging plaintiff's involvement in criminal conduct or to unlawfully search plaintiff's home and residence. Further, at no time was the District Attorney's office or any of its employees influenced in any way by defendants Lorenz, Herpolsheimer or Klarfeld in relation to its independent investigation and prosecution of plaintiff Harris' criminal activities.

10. Any conclusions of law recited below which should be deemed a finding of fact are found to be true in all respects and is hereby adopted as such.

CONCLUSIONS OF LAW

1. There is no genuine issue as to any of the foregoing facts which are determinative of the issues and causes herein.

2. Pursuant to the Doctrine of Collateral Estoppel this Court must give preclusive effect to the ruling of Municipal Court Judge Amos that plaintiff Harris suffered no violation of his civil rights as a result of the issuance of the search warrant and/or subsequent search. Thus plaintiff Harris is precluded from attempting to relitigate any claims raised, or that could have been raised, in the underlying state court criminal proceedings.

D

3. Defendants Samson, Shinnick and Waight are absolutely immune from liability under 42 United States Code Section 1983 for their advocatory actions in initiating judicial proceedings against plaintiff Harris. These advocatory functions included such preparatory activities as obtaining, reviewing, and evaluating evidence as such functions are an integral part of a prosecutor's absolutely immune discretionary decision as to whether to initiate a formal prosecution.

4. Defendants Lorenz, Herpolsheimer and Klarfeld were not the proximate cause of any alleged deprivation of plaintiff's Fourth Amendment rights and are therefore not liable to plaintiff Harris under the civil rights act.

5. Defendants Lorenz, Herpolsheimer and Klarfeld's actions as alleged in the complaint herein were not under color of state law and they thereby cannot be held liable to plaintiff Harris under the civil rights act.

6. Defendants herein did not at any time conspire or engage in a common plan to violate plaintiff Harris' fourth Amendment rights or any other constitutional rights.

///

///

///

///

///

///

///

D

7. Any finding of fact recited above which should be deemed a conclusion of law is hereby adopted as such.

DATED:

JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

DATED: 8-8-86

LLOYD M. HARMON, JR., County Counsel

By
PAUL N. BRUCE, Deputy
EUGENE P. KENNY, Deputy
Attorneys for Anthony Samson
Duane Shinnick and Harold Waight

DATED:

GEORGE WEINGARTEN, Esq.
Attorneys for Jean Leonard Harris

DATED: 8/11/86

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY, MYERSON & CASEY

By
MICHAEL L. LIPMAN, Esq.
PAUL E. PIERCE, JR., Esq.
Attorneys for M. James Lorenz and
Ronald Herpolsheimer

DATED: 8-18-86

POST, KIRBY, NOONAN & SWEAT

By
GEGORY A. POST, Esq.
Attorneys for Myron Klarfeld

D

IN THE MUNICIPAL COURT OF THE SAN DIEGO JUDICIAL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

DOCKET NO. [illegible]

The People of the State of California vs. JEAN LEONARD HARRIS

Attorney for Defendant

Bail set at $ & Pen. Asst. $

Bail Deposited $ & Pen. Asst. $

PROCEEDINGS

AUG 3 1983 — Complaint Filed CHARGE: Vio. of Sec. 11023/11010 BP; 11023/11018.2 2cts BP of the Co

AUG 31 1983

DDA/~~DGR~~: Duane Skinnock
DEFENSE COUNSEL: in person - by Ronald Frost for Charles Gilday
REPORTER: F. B. Bodden
PROB. OFF.

Motion by Counsel for defendant
For Continuance for setting to be present
The People: Object Concur Take no position
Motion granted Denied

Case continued to 9-12-83 @ 10:00 A.M. for arraignment

Defendant released on his own recognizance.

NICHOLAS KASIMATIS
~~MEH~~

SEP 12 1983

For the People: DDA Peter Doddoch
For the Defendant: in person and by Ronald Frost for this appearance on for Charles G. Gilday, Jr.
Court Reporter: Harvey Wm. Kuo
Defendant in court, gives true name as Same
Defendant informed of the charge against him, his rights, of his right to the aid of counsel in every stage of the proceedings, and is delivered a copy of the complaint.
Defendant arraigned. Advised of constitutional rights.
Defendant pleads not guilty.
Defendant is hereby ordered to appear for preliminary hearing in Presiding Dept. on Wed 9-21 at 8:15 A M
Bail set at $
Time waived.
Acknowledgement of Advisal of Constitutional Rights signed and filed in open Court.
Waiver of [illegible] presence signed in open Court per [illegible] filed.

Order for bond and release per P.C. 13150 issued.

Defendant released on his own recognizance.

Form 209 REV (1/67) OVER

E

Municipal Court of California, County of San Diego

San Diego Judicial District

The People of the State of California vs. Jean F. Harris

CRIMINAL DOCKET - PAGE 7 No. F79822

NOV. 2, 1983

E. photocopy of newspaper article.
Defendant moves to have exhibit E received in evidence.
People Object.
Objection Granted. Exhibit E is not received in evidence.
Defendant's exhibit marked for identification:
F. photo copy of a news paper article.
Counsel for Defendant moves to have Exhibits E AND F received in Evidence. People Object.
E and F are not received in evidence.
Defendant's witness, Ronald Herponsheimer, resumes the stand.
2:45 PM. Court in recess.
3:20 PM. Court reconvenes. All parties present.
People's witness sworn and examined: Anthony Samson.
People Rest.
Hearing held as to Motion to Traverse Search Warrant.
Opening argument by Counsel for the Defendant.
Argument by Counsel for the People.
Closing argument by Counsel for the Defendant.
Summation by the Court.
Motion by Counsel for defendant to Suppress the Search Warrant is Granted.
4:05 PM. Court in recess.
4:17 PM. Court reconvenes. All parties present.
Counsel for Defendant re-news Motion for Estobar.
Motion Denied.
Defendant waives his right to a continuous Preliminary Hearing.
4:22 PM. Court in recess. All parties instructed to return 11-7-83 at 9:00 AM.

E. MAC AMOS

NOV. 7, 1983

9:10 AM. Court reconvenes. All parties present.
Counsel for the People moves to re-open and re-consider Traversal.
Counsel for Defendant objects.
Objection over-ruled.
People's witness sworn and examined: Randall Pyle
Counsel for defendant objects to testimony of Randall Pyle.
Objection is noted.
Stipulation to the identification of Defendant.
People's exhibit marked for identification:
34. [redacted] series of documents
People move to have exhibit 34 received in evidence.
Counsel for defendant objects. Court reserves ruling.
People's exhibit marked for identification:
35. listing agreement.
People re-news motion to have exhibit 34 received in evidence.
Counsel for defendant objects.
Objection over-ruled with the exception of news-paper article.

OVER

Form 393

E

NOV. 7, 1983

People move to have exhibit 35 received in evidence.
Counsel for Defendant objects. Court reserves ruling.
People's witness sworn and examined: Robert Kuretich
People's exhibit marked for identification:
36. manila envelope containing documents.
People move to have exhibit 36 received in evidence.
No objection by Counsel for Defendant.
Exhibit 36 is received in evidence.
People's witness sworn and examined: Harold Waight
People's exhibits marked for identification:
37. document
38. 2 page computer print out.
10:26 AM. Court in recess.
10:40 AM. Court reconvenes. All parties prsent.
People's witness, Harold Waight, resumes the stand.
People's exhibit marked for identification:
39. computor print out
11:00 AM. Court in recess.
11:15 AM. Court reconvenes. All parties present.
People's witness, Harold Waight, resumes the stand.
Motion by Counsel for Defendant to hear Motion to Recluse District Attorney's Office at this time.
Motion Denied.
Counsel for Defendant resumes cross examination.
12 Noon. Court in recess.
1:40 PM. Court reconvenes. All parties present.
Harold Waight resumes the stand.
Defendant's exhibit marked for identification:
G. manila folder containing various documents.
1:50 PM. Court in rcess.
2:05 PM. Court reconvenes. All parties present.
Harodl Waight resumes the stand.
People's exhibit marked for identification:
40. search warrant and affidavit #7893
People move to have exhibit 40 received in evidence.
No objection by Counsel for Defendant.
Exhibit 40 is received in evidence.
People's exhibits marked for identification:
41. investigating of Jean L. Harris'
41a. report of telephone calls
41b. " " " "
People move to have exhibit 41 received in evidence.
No objection by Counsel for Defendant.
People's exhibits marked for identification:
42. computer print out
43. certified copy of a deed of trust
Motion by Counsel for defendant to defer further examination of Harold Waight.
Counsel for Defendant withdraws Motion.
People have no further witnesses.

Opening argument by Counsel for the People as to Proposition 8 and Ineviatable Discovery.
Argument by Counsel for the Defendant.
Closing argument by Counsel for the People.

E

Municipal Court of California, County of San Diego

San Diego Judicial District

The People of the State of California vs. Jean T. Harris

CRIMINAL DOCKET - PAGE 9 No. F79922

NOV. 7, 1983

3:45 PM. Court in recess.
3:58 PM. Court reconvenes. All parties present.
Summation by the Court.
Motion by the People to Reconsider Traversal is Denied.
Court find's Proposition 8 is applicable as to Counts 1,2 and not as to Count 3.
AS TO COUNTS 1 and 2:
Non of the documents received will not be suppressed.

AS TO COUNT 3:
Exhibits 18,23,26,27,and 28 will be suppressed.

Count find's that Discovery would have been discovered and testimony will ~~be~~ not be suppressed.
Defendant waives his right to a continuous Preliminary Hearing.
All parties instructed to return 11-7-83 at 9:00 AM.

E. MAC AMOS

NOV. 9, 1983
For The People: DDA Anthony Samson
For The Defendant: Ronald Frant, Defendant Not Present
Court Reporter: Duane Rankin

Motion by Counsel for Defendant to vacate 11-7-83 at 9:00 AM. and continue case to Nov. 14, 1983 at 9:30 AM.
No opposition by the People.
Motion Granted.
CASE RE-SET FOR NOV. 14, 1983 at 9:30 AM.

E. MAC AMOS

NOV. 14, 1983
For The People: DDA Duane Shinnick
For The Defendant: Charles Goldberg, Defendant Present
Court Reporter: Duane Rankin Court convenes 10:15 AM.
AS TO COUNT 3:
Defendant sworn and examined.

Pursuant to Sec. PC 17b(5) and with the consent of the prosecuting attorney and the defendant, the Court determines that the offense is a misdemeanor.

OVER

Form 393

E

No. 88-543

FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JEAN LEONARD HARRIS, Petitioner

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT COUNTY OF SAN DIEGO, RONALD HERPOLSHEIMER, JAMES LORENZ AND MYRON KLARFELD, Respondents

SUPPLEMENT TO

PETITION FOR WRIT OF CERTIORARI

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JEAN LEONARD HARRIS, Pro Se
16776 Bernardo Center Dr. Suite 110B
San Diego, California 92128
(619)485 1177

21pp

PETITIONER HAS TIMELY FILED THE PETITION FOR WRIT OF CERTIORARI

EXPLANATION

The judgment of the Ninth Circuit was filed on January 25, 1988. See Exhibit "A" herein. On February 8, 1988, Petitioner filed, with the Ninth Circuit Court of Appeals, a "petition for rehearing with suggestion for rehearing en banc". See Exhibit "A". On April 7, 1988, the Court of Appeals filed an order stating that "The suggestion for a rehearing en banc is rejected". See Exhibit "A".

On April 21, 1988, the District Court ordered the above matter to be placed on calendar, May 31, 1988, for further proceedings re attorney fees. See Exhibit "B". On May 31, 1988, Petitioner advised the District Court that he intended to file the Petition for Writ of Certiorari herein. After

Petitioner represented to the District Court that the Court of Appeals order was filed on or about April 7, 1988 and that Petitioner had 90 days from that date to file the herein Petition, and absent any objection by opposing counsel, the District Court continued the hearing to August 29, 1988, in order to allow Petitioner the 90 days to file this Petition. See Exhibit "C".

On July 1, 1988, Petitioner filed the herein Petition by placing said Petition in the United States mail. Said Petition was returned by the United States Supreme Court Clerk's Office because the petition was printed on the wrong size paper and a question regarding the timeliness of the Petition. Petitioner contacted the Clerk's Office and was advised to file an "Affidavit of Mailing" in order to make the July 1, 1988 date a timely filing date.

Petitioner reprinted the Petition and refiled together with the Affidavit. See Exhibit "D".

Thereafter, Mr. Francis J. Lorson, Chief Deputy Clerk, advised Petitioner that the order of the Court of Appeals only made reference to the "suggestion for rehearing en banc". Petitioner was advised by Mr. Lorson, first, to seek a modification of the Court of Appeals order to reflect a denial of the Petition for Rehearing. Unless there was evidence that the Court of Appeals denied the Petition for Rehearing, Mr. Lorson stated that he did not desire to speculate on the denial in order to give Petitioner the 90 days from April 7, 1988 to file the Petition with the Supreme Court.

On August 11, 1988, Petitioner filed with the Court of Appeals a request to clarify the order of April 7, 1988. Petitioner requested that the Court of

Appeals state that the Petition for Rehearing was denied. See Exhibit "E". On August 26, 1988, the Court of Appeal denied Petitioner's request to clarify the order of April 7, 1988. See Exhibit "F".

On or about September 14, 1988, Petitioner discussed the above dilemma with Mr. Lorson and was advised to file this Supplement together with the Court of Appeal docket entry indicating that the Petition was filed as a Petition for Rehearing and handled as such by the Court of Appeal.

It is Petitioner's opinion that the filing of the Petition herein was timely because:

1. The docket entry states that Petitioner filed a "Petition for Rehearing" and the document was treated as such by the Court of Appeals.

2. Rule 20.4 states that the time

for filing a petition for writ of certiorari is extended if a petition for rehearing is filed (this was done) and the time will thereafter run from the date of denial of rehearing (Court of Appeal refused to clarify this issue) or of the entry of a subsequent judgment entered on the rehearing. The judgment (exhibit "A" to Petition) shows that a subsequent judgment was entered (as a result of the April 7, 1988 order) on June 15, 1988- it was received April 21, 1988, and filed May 31, 1988.

3. The District Court and opposing counsel have treated the Petition for Rehearing as such. The District Court and opposing counsel had read the April 7, 1988 order and, on May 31, 1988, all parties and the District Court, treated the order as a denial of the Petition for Rehearing and continued the hearing date specifically to allow Petitioner to have

the 90 days from April 7, 1988, to file the herein Petition.

4. The Court of Appeal denial of Petitioner's request for rehearing, although not containing the traditional language, must, by necessary implication, deny what Petitioner filed with the Court of Appeal- it was docketed as a "Petition for Rehearing".

5. There is no prejudice to the District Court, opposing counsel and the Court of Appeal, to recognize the docket entry for what it states and treat the order as a denial of the Petition for Rehearing.

6. The Petition for Rehearing, filed on February 8, 1988, must be treated as having been denied- thereby making timely the filing of this Petition, or still pending- also making timely the filing of this Petition.

7. The Petition was filed within 90

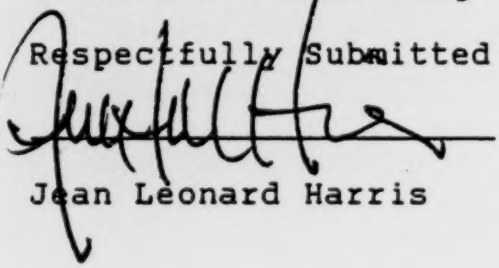
days of the last order of the Court of Appeals relevant to the docket entry of February 8, 1988. That entry states a "Petition for Rehearing" was filed. If the April 7, 1988, order has now been determined to be the Court's last word on the subject, that order also denies the document filed on February 8, 1988- the Petition for Rehearing.

8. Had the District Court and opposing counsel not acquiesced in Petitioner's right to file the Petition herein within 90 days of the April 7, 1988 order, Petitioner would have had the right to Petition the Supreme Court under Rule 20.6 for an extension of time to file. The order of the Court of Appeal was received by Petitioner on or about April 15, 1988- merely 10 days before the expiration of 90 days from date of original judgment.

For all of the above reasons,

Petitioner submits that the Petition herein filed was timely as filed within 90 days of the last order on a matter docketed as a Petition for Rehearing.

Respectfully Submitted



Jean Leonard Harris

EXHIBIT A

THIS EXHIBIT CONTAINS ENTRIES RELEVANT

TO THE REHEARING OF JUDGMENT

GENERAL DOCKET FOR

Ninth Circuit Court of Appeals
Court of Appeals Docket #86-6570 CIVATT
CLOSED Filed: 11/6/86
Harris v Dpty Dist.Attorney, et al
Appeal from: U.S. District Court for the Southern District of California

---

Case type information:
1) civil
2) private
3)

Lower court information:
District:0974-3:CV-84-0767-T
presiding judge: Howard B. Turrentine, Senior Judge
Date filed: 3/28/86
Date order/judgment:10/27/86
Date NOA filed:10/27/86

Fee status:paid

Prior cases:
none
Current cases:
none

Docket as of September 14, 1988 9:32am
Page 1

Proceedings include all events. CIVATT
CLOSED

86-6570 Harris v Dpty Dist.Attorney,et al

*******...

1/25/88 FILED MEMORANDUM OPINION (WALLACE, NORRIS, author THOMPSON),AFFIRMED FILED AND ENTERED JUDGMENT [86-6570] ec [Entry date 1/27/88]

******...

******...

2/8/88 [487724]Filed original and 40 copies Appellant Jean Leonard Harris petition for rehearing with suggestion for rehearing en banc 12 pages, served on 2/5/88 (Panel and All Active Judges) [86-6570] (rc)

******.....

******.....

....

....

....

....

....

....

....

....

....

....

Proceedings include all events. CIVATT
86-6570 Harris v Dpty Dist.Attorney,etal
CLOSED

.....

.....

.....

.....

.....

.....

.....

4/7/88 Filed order (WALLACE, NORRIS, THOMPSON) The suggestion for a rehearing en banc is rejected. [487724-1][86-6570] (jw) [Entry date 4/11/88]

.....

.....

.....

.....

.....

.....

.....

.....

.....

Proceedings include all events. CIVATT
86-6570 Harris v Dpty Dist.Attorney et al
CLOSED

.....

.....

.....

8/11/88 Received as of 8/11/88,ltr dated 8/8/88, from Jean L. Harris requesting that a clarification of the order filed 4/7/88,be made.(PANEL)served on 8/8/88 [86-6570] (rc) [Entry date 8/12/88]

.....

.....

8/26/88 Filed order (WALLACE, NORRIS THOMPSON) The request of aplt Jean Leonard Harris for clarification of the court's order filed on April 7, 1988 is denied. [1084166-1] [86-6570] (jw)

.....

.....

.....

.....

.....

.....

EXHIBIT B

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEAN LEONARD HARRIS vs DEPUTY DISTRICT ATTORNEY No. 84-0767-T

Hon. HOWARD B. TURRENTINE Ctrm Dep C. SPANDONI RcDr_____

Attorneys

Plaintiffs	Defendants
_____	_____
_____	_____

PROCEEDINGS: X In Chambers ___In Court

The Court orders the above-entitled matter placed on calendar for further proceedings re attorney fees on Tuesday, May 31, 1988, at 10:30 A.M.

Mailed copies 4/21/88 to:

Paul Pierce
Finley Kumble Wagner, etc
101 West Broadway Ste 1500
San Diego, CA 92101

Jean Leonard Harris
16776 Bernardo Center Dr., Ste 110B
San Diego, CA 92128

Gregory Post
1400 Imperial Bank Tower
701 "B" St., Ste 1400
San Diego, CA 92101-4532

Paul Bruce
1600 Pacific Hwy Rm 235
San Diego, CA 92101-2469

EXHIBIT C.

Date:4/21/88 Initials CS

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEAN LEONARD HARRIS vs DEPUTY DISTRICT ATTORNEY No. 84-0767-T

Hon.HOWARD B. TURRENTINE Ctrm Dep COREY SPANDONI RcDr IN CHAMBERS

Attorneys

_____ _____

_____ _____

PROCEEDINGS: X In Chambers ___In Court

The Court orders the hearing set for status regarding attorney's fees, presently set for August 29, 1988, continued to September 6, 1988 at 10:30 A.M.

Mailed copies 8/1/88 to:

Finley Kumble Wagner
101 West Broadway Ste 1500
San Diego, CA 92101

Jean Leonard Harris
16776 Bernardo Center Dr., Ste 110B
San Diego, CA 92128

Robert Friedenbuerg
Post Kirby Noonan Sweat
1400 Imperial Bank Tower
701 "B" St., Ste 1400
San Diego, CA 92101

Paul Bruce
1600 Pacific Hwy Rm 235
San Diego, CA 92101

Date:8/1/88 Initials CS

EXHIBIT D

AFFIDAVIT OF MAILING

On July 1, 1988, at about 1:00 P.M., I placed in the United States mail, first class postage prepaid, at the post office located in Rancho Mirage, California, the PETITION FOR WRIT OF CERTIORARI captioned JEAN LEONARD HARRIS, Petitioner, vs DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, et al, mailed to the Clerk of the United States Supreme Court, One First Street, NE, Washington, D.C. 20453.

The mailing of the PETITION was timely in accordance with Rule 20.4 in that the petition for rehearing was rejected on April 7, 1988, the order filed May 31, 1988 and judgment entered on June 15, 1988.

The PETITION was returned to me because the size of the paper was wrong. I received the return on July 23, 1988, and immediately reprinted the PETITION on the appropriate size paper and mailed said PETITION on July 28, 1988, first class postage prepaid to the Clerk of the United States Supreme Court, One First Street, NE, Washington, D.C. 20453.

I am a member of the State Bar of the State of California and admitted to practice before the United States Supreme Court.

I declare under penalty of perjury that the forgoing is true and correct. Executed on July 28, 1988, at Rancho Mirage, California.

_____

Jean Leonard Harris

EXHIBIT E

Jean Leonard Harris
16776 Bernardo Center Drive
Suite 110 B
San Diego, California 92128
(619) 485-1177

August 8. 1988

Clerk of the Court
United States Court of Appeals
Ninth Circuit
Seventh and Mission Streets
Post Office Box 547
San Francisco, California 94101

Re: Harris v Samson et al
No 86-6570
D.C. No CV 84-0767-Y

Dear Clerk:

I am requesting that a clarification of the Order filed on April 7, 1988 be made. I have discussed this matter with Joe Williams of your office. The Petition For Rehearing En Banc, was docketed as a Petition for Rehearing together with a suggestion for hearing en banc. However, the Order only makes reference to a rejection of the suggestion for a rehearing en banc without reference to or a denial of the Petition for Rehearing. As I understand, the order normally reads that the Petition for Rehearing is denied and the suggestion for a rehearing en banc is rejected. I ask that the Order in this matter be clarified to read accordingly.

The reason for the request is as follows. The Clerk of the Untied States Supreme Court will accept the Petition for Writ of Certiorari within 90 days of denial of the Petition for Rehearing. Without

mention within the order that the Petition for Rehearing was denied, the Clerk of the Supreme Court will not speculate as to the effect of the above order in this case. That is, the order must specifically mention that it is also a denial of the Petition for rehearing. With this clarification, the Clerk of the Supreme Court will accept for filing the Petition for Writ of Certiorari already in his possession.

Respectfully Requested,

Jean Leonard Harris /s/

cc Paul Bruce, esq.
Michael Lipman, esq.
Gregory Post, esq.

Francis J. Lorson
Chief Deputy Clerk
Supreme Court of the United States

EXHIBIT F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 26 1988
Cathy A Catterson, Clerk
U.S. Court of Appeals

JEAN LEONARD HARRIS	
	No. 86-6570
Plaintiff,	D.C.No.CV-84-0767-T
v.	ORDER
DEPUTY DIST. ATTY. et al.	
Defendants	

Before: WALLANCE, NORRIS, AND THOMPSON, CIRCUIT JUDGES

The request of appellant Jean Leonard Harris for clarification of the Court's order filed on April 7, 1988 is DENIED.

CERTIFICATE OF SERVICE

On September 23, 1988, I served the attached documents (SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI) on the interested parties in this action, by mailing a copy to the following:

Paul N. Bruce, Esq.
Deputy County Counsel
1600 Pacific Highway, Rm 235
San Diego, California 92101-2467

Michael L. Lipman, Esq.
Lorenz, Alhadeff and Lundin
101 West Broadway, Suite 1500
San Diego, California 92101

Gregory Post, Esq.
701 B Street, Suite 1400
San Diego, California 92101

Executed this 23rd day of September 1988, at Rancho Mirage, California.

16776 Bernardo Center Drive, Suite 110B
San Diego, California 92128

Jean Leonard Harris

Supreme Court, U.S.
FILED
NOV 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-543

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JEAN LEONARD HARRIS,

Petitioner,

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity; DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity; COUNTY OF SAN DIEGO; RONALD HERPOLSHEIMER; JAMES LORENZ; MYRON KLARFELD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent Myron Klarfeld

Gregory A. Post
POST, KIRBY, NOONAN & SWEAT
701 "B" Street, Suite 1400
San Diego, California 92101
(619) 231-8666

NO. 88-543

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JEAN LEONARD HARRIS,

Petitioner,

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity; DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity; COUNTY OF SAN DIEGO; RONALD HERPOLSHEIMER; JAMES LORENZ; MYRON KLARFELD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent Myron Klarfeld

Gregory A. Post
POST, KIRBY, NOONAN & SWEAT
701 "B" Street, Suite 1400
San Diego, California 92101
(619) 231-8666

QUESTIONS PRESENTED FOR REVIEW

A. SINCE THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED UNDER RULE 20, SHOULD THE SUPREME COURT CONSIDER THE PETITION?

B. HAS PETITIONER PRESENTED ANY "SPECIAL AND IMPORTANT REASONS" UNDER RULE 17 WHY THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI?

C. HAS PETITIONER COMPLIED WITH THE THE RULE 21 CONTENT AND FORM REQUIREMENTS FOR THE PETITION OF WRIT OF CERTIORARI?

TABLE OF CONTENTS

1. QUESTIONS PRESENTED FOR REVIEW . 2

TABLE OF CONTENTS. 3

TABLE OF AUTHORITIES 5

2. JURISDICTION 7

3. STATEMENT OF THE CASE. 9

4. SUMMARY OF ARGUMENT. 12

5. ARGUMENT 16

A. THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED UNDER RULE 20 AND THEREFORE THE SUPREME COURT SHOULD NOT CONSIDER THE PETITION. 16

B. PETITIONER HAS NOT PRESENTED ANY "SPECIAL AND IMPORTANT REASONS" UNDER RULE 17 WHY THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI. 21

C. PETITIONER HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 21 GOVERNING THE CONTENT AND FORM OF THE PETITION FOR WRIT OF CERTIORARI. 30

Table of Contents
Continued

6. CONCLUSION 32

APPENDIX 34

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) . . 26,27

Durham v. United States, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971) 22

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983) 27

Teitelbaum Furs, Inc. v. Dominion Insurance Co., 58 Cal. 2d 601 (1962) 27

Statutes

28 U.S.C.:
§ 1254(1). 7
§ 2101(c). 7,14,20

42 U.S.C.:
§ 1983 . . . . . 9,10,11,12, 13,16,23,24, 25,27,28
§ 1988 11,25,29

Supreme Court Rules of Court:
Rule 17. . . . . 12,21,26,29, 32
Rule 17.1. 14,22
Rule 17.1(a) 22
Rule 17.1(b) 22

Table of Authorities
Continued

Rule 17.1(c) 22
Rule 20. 7,14,16,32
Rule 20.2. 7,14,16,20
Rule 20.4. 8,18,19,20
Rule 21. 15,30,32
Rule 21.4. 30
Rule 21.5. 30
Rule 33. 18

United States Constitution:
Fourth Amendment 9,11,12,13,
16,23,24,27

JURISDICTION

Petitioner has sought review of this case by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

However, the Petition was not timely filed under Rule 20 and therefore this Court should not consider the Petition. Petitioner had 90 days from the Court of Appeals' judgment on January 25, 1988 as prescribed by Rule 20.2 and 28 U.S.C. § 2101(c) in which to file his Petition. (That 90-day period expired on or about April 24, 1988.) The Petition was not filed with this Court until July 12, 1988.

Petitioner has argued the time for filing his Petition was tolled.

This is incorrect. Rule 20.4 does delay the time for filing a Petition so that the period begins to run from when a petition for rehearing, if any, is denied or a subsequent judgment on the rehearing is entered. However, Petitioner never filed a petition for rehearing with the Court of Appeals. On February 8, 1988, Petitioner did file with the Court of Appeals a "Petition for Rehearing En Banc" which Supreme Court Chief Deputy Clerk Francis J. Lorson recognized did not toll the time for filing the Petition for Writ of Certiorari in his letter to Petitioner of July 13, 1988. See discussion on pages 17-21, infra. Therefore, the Supreme Court should not consider the Petition since it was filed well outside

the 90-day period after the Court of Appeals judgment on January 25, 1988.

3.

STATEMENT OF THE CASE

Petitioner brought a 42 U.S.C. § 1983 claim against all of the Respondents named herein alleging that Respondents had violated his Fourth Amendment rights as a result of a search of his office and residence and a seizure of documents. This action was brought despite the fact that the San Diego County Municipal Court criminal proceeding against Petitioner determined that none of Petitioner's federal constitutional rights were violated by the actions taken in obtaining the search warrant and searching

/ / /

Petitioner's office pursuant to that warrant.

Regardless of what Petitioner might say in his Statement Of The Case in an attempt to cloud the issues, the Municipal Court expressly ruled that the searches and seizure in question did not violate any of Petitioner's federal constitutional rights. This ruling was the basis on which the District Court granted Respondents' Motions for Summary Judgment at the District Court level under the doctrine of collateral estoppel.

The Court of Appeals affirmed the District Court's dismissal of his section 1983 claim. The Court of Appeals ruled that the collateral estoppel doctrine was correctly applied

by the District Court since the Fourth Amendment issue underlying Petitioner's civil action was fully litigated in the Municipal Court proceeding.

Significantly, the Court of Appeals further ruled that Petitioner's arguments that collateral estoppel did not bar his civil rights claim were "entirely without merit" and awarded attorneys' fees to Respondents pursuant to 42 U.S.C. § 1988 which allows defendants in section 1983 actions to recover attorneys' fees when the plaintiff's action is frivolous.

With this Petition for Writ of Certiorari, notwithstanding the fact it was not timely filed, Petitioner seeks to have this Court again review and decide settled issues in this case

without stating a single "special and important reason" under Rule 17 why the Supreme Court should grant his Petition.

4.

SUMMARY OF ARGUMENT

The gravamen of Petitioner's section 1983 Complaint was that his Fourth Amendment rights were violated by the search of his office and residence, and the seizure of documents pursuant to a search warrant issued without probable cause. The Municipal Court judge hearing the matter ultimately ruled that the searches and seizures in question were with probable cause under applicable California and federal law and did not violate Petitioner's Fourth Amendment or other constitutional rights.

In the subsequent section 1983 action alleging a violation of his Fourth Amendment rights, the District Court granted all of the Respondents' Motions for Summary Judgment relying primarily on the doctrine of collateral estoppel since Petitioner was attempting to relitigate the same constitutional issues already raised and ruled on in the Municipal Court. On appeal, the Ninth Circuit affirmed the District Court's dismissal of his section 1983 claim on the same grounds of collateral estoppel. Petitioner then chose to attempt to file the instant Petition for Writ of Certiorari which is seriously defective in at least three respects.

First, as already discussed under the "Jurisdiction" section of this

brief, supra, this Petition was not timely filed as required by Rule 20. For that reason, the Court should not consider the Petition. Petitioner had 90 days from the Court of Appeals' judgment on January 25, 1988 as prescribed by Rule 20.2 and 28 U.S.C. § 2101(c) in which to file his Petition. The Petition was not filed with this Court until July 12, 1988, approximately 78 days late.

Second, Petitioner has not presented any "special and important reasons" using the guidelines contained in Rule 17.1 for the Supreme Court to review the questions presented by Petitioner to this Court.

Third, Petitioner has also failed to comply with the requirements

of Rule 21 governing the content and form of the Petition for Writ of Certiorari. Petitioner has manifestly failed to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration by this Court. Further, Petitioner's rambling prose filling 41 pages is well outside the 30-page limit imposed by Rule 21.

For all these reasons, the Supreme Court clearly should not use its sound judicial discretion to grant Petitioner's Petition for Writ of Certiorari.

/ / /

/ / /

/ / /

ARGUMENT

A.

THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED UNDER RULE 20 AND THEREFORE THE SUPREME COURT SHOULD NOT CONSIDER THE PETITION

On January 25, 1988, the Ninth Circuit Court of Appeals filed a Memorandum Opinion, and judgment was entered, affirming the District Court's dismissal of Petitioner's section 1983 claim that Respondents had violated his Fourth Amendment rights. (Appendix "A.")

On or about February 8, 1988, Petitioner filed with the Ninth Circuit a document entitled "Petition for Rehearing En Banc of the Memorandum Decision of January 25, 1988" which requested an en banc panel of the Ninth

Circuit, not a rehearing before the original three-judge panel, to review the decision.

In response, on April 7, 1988, the Ninth Circuit issued an Order which stated, in its entirety:

> The panel, as constituted above, has unanimously voted to reject the suggestion for a rehearing en banc.
>
> The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).
>
> The suggestion for a rehearing en banc is REJECTED. (Appendix "B.")

On or about July 1, 1988, Petitioner attempted to file his Petition for Writ of Certiorari by mail with the Supreme Court. This Petition was rejected by the Chief Deputy Clerk

of the Supreme Court, Francis J. Lorson, in his letter to Petitioner of July 13, 1988. (Appendix "C.") Mr. Lorson noted that Petitioner's Petition was not presented on the correct size paper as required by Rule 33. More importantly, Mr. Lorson stated that the Petition was out of time. Mr. Lorson's letter stated, in pertinent part, that:

> Since judgement [sic] was entered by the Court of Appeals on January 25, 1988, the time to file this petition expired April 24, 1988. The petition for rehearing en banc order does not toll the time for filing a petition in this Court.

Rule 20.4 states: "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered . . . ."

/ / /

Rule 20.4 also notes that

> [H]owever, if a petition for rehearing is timely filed by any party in the case, the time for filing the writ of certiorari for all parties . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment entered on the rehearing (emphasis added).

On or about August 11, 1988 Petitioner, in an attempt to fall within the tolling provisions of Rule 20.4, filed with the Court of Appeals a request to "clarify" its Order of April 7, 1988 to now state that it was also denying a Petition for Rehearing. (Appendix "D.") The Court of Appeals panel flatly denied this request in its Order filed August 26, 1988 which stated, in its entirety: "[T]he request of appellant Jean Leonard Harris for clarification of the Court's order filed

on April 7, 1988 is DENIED." (Appendix "E.")

Despite the August 26, 1988 Order, Petitioner filed a Supplement to his Petition on or about September 26, 1988 in which he argues his Petition was timely filed. However, Petitioner does not, and cannot, explain why this Court should now accept his Petition which clearly violates the Court's own rules.

Petitioner's time to file the Petition for Writ of Certiorari was not tolled by Rule 20.4 and began to run from the time of the Ninth Circuit's Memorandum Opinion on January 25, 1988. The Supreme Court should not consider the Petition after the time allowed in Rule 20.2 and 28 U.S.C. § 2101(c): 90 days after the entry of judgment or

decree. That 90-day period expired on or about April 24, 1988. Again, as the Supreme Court Chief Deputy Clerk correctly pointed out to Petitioner in his letter of July 13, 1988, "the petition for rehearing en banc order does not toll the time for filing a petition in this Court." (See Appendix "C.")

For the foregoing reasons, since the Petition was not timely filed, the Petition should not be considered by the Court.

B.

PETITIONER HAS NOT PRESENTED ANY "SPECIAL AND IMPORTANT REASONS" UNDER RULE 17 WHY THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of

judicial discretion, and will be granted only when the petitioner has presented "special and important reasons" for granting that review. Rule 17.1; Durham v. United States, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971). Rule 17.1, subsections (a), (b), and (c) "indicate the character of reasons" that the Supreme Court will consider in using its judicial discretion to determine whether to grant a review on writ of certiorari. Simply put, using those guidelines contained in Rule 17.1, Petitioner has not presented any "special and important reasons" why the Supreme Court should grant this Petition for Writ of Certiorari.

Petitioner seeks only to have the Supreme Court review the exact same

issues already raised and rejected in the courts below. The gravamen of Petitioner's section 1983 complaint was that his Fourth Amendment rights were violated by the search of his office and residence, and a seizure of documents pursuant to a search warrant issued without probable cause. Petitioner previously raised and litigated the identical claim of a Fourth Amendment violation in the context of his motions to suppress evidence and traverse the search warrant made at the preliminary hearing. The Municipal Court judge hearing the matter ultimately ruled that the searches and seizure in question were with probable cause under applicable California and federal law and did not violate

Petitioner's Fourth Amendment rights. Petitioner pled guilty to the charges against him and waived his rights to appeal in the state criminal proceeding causing the ruling to become final.

In the subsequent section 1983 action alleging a violation of his Fourth Amendment rights, the District Court granted all of the Respondents' Motions for Summary Judgment relying primarily on the doctrine of collateral estoppel. The District Court held that Petitioner was precluded from relitigating constitutional issues already raised in the Municipal Court. On appeal, the Ninth Circuit affirmed the District Court's dismissal of his section 1983 claim on the same grounds of collateral estoppel ruling that:

Because the Fourth Amendment issue underlying Harris' civil action was fully litigated in the state court criminal proceeding, collateral estoppel is available to bar Harris' section 1983 claim and the district court did not abuse its discretion in dismissing Harris' complaint on that ground.

In fact, Petitioner's appeal was so obviously meritless that the Court of Appeals awarded attorneys' fees pursuant to 42 U.S.C. § 1988 which allows defendants in section 1983 actions to recover attorneys' fees when the plaintiff's action is frivolous. The Court of Appeals concluded that "[h]ere the doctrine of collateral estoppel obviously barred Harris' claim. His arguments to the contrary are entirely without merit."

/ / /

The apparent thrust of Petitioner's arguments, if any substance at all can be distilled from those muddy waters, seems to be that the Supreme Court is required to settle alleged "differing views" between the Ninth and Seventh Circuits in the application and scope of the doctrine of collateral estoppel. However, it is most significant for this Court to note that Petitioner has not cited one decision by the Ninth Circuit in conflict with a Seventh Circuit decision "on the same matter" as contemplated by Rule 17 which would justify granting certiorari. Petitioner does not articulate any conflicts because there are none.

Under Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308

(1980), all federal courts must "give preclusive effect to state court judgments whenever the courts of the state for which the judgments emerged would do so." Id. at 96, 101 S.Ct. at 415. The Supreme Court has also instructed the federal courts that they should apply state collateral estoppel law in determining whether a section 1983 claim is precluded by a prior state court proceeding. Haring v. Prosise, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983). Accordingly, the Ninth Circuit ruled in accordance with well-settled California law, Teitelbaum Furs, Inc. v. Dominion Insurance Co., 58 Cal. 2d 601, 607 (1962), that because the Fourth Amendment issue raised by Petitioner was fully litigated in the

state court criminal proceeding, collateral estoppel was a complete bar to his section 1983 claim.

Both the Ninth and Seventh Circuits are in accord that identical issues fully litigated in a state court proceeding are barred from relitigation in a subsequent section 1983 action. Seventh Circuit cases Petitioner cites which apparently refuse to apply the collateral estoppel doctrine in a section 1983 claim when a defendant challenges the "integrity" of the evidence presented in a probable cause hearing are confined to the specific facts of those cases. Petitioner has not articulated any conflict which would rise to the level of a special and

/ / /

important reason for the Supreme Court to grant certiorari.

Finally, Petitioner's professed displeasure with the Court of Appeals' award of attorneys' fees to Respondents under 42 U.S.C. § 1988 is understandable, but clearly not a question of federal law requiring Supreme Court review.

In sum, Petitioner has not presented the Court any grounds under Rule 17 on which this Court should grant the Petition for Writ of Certiorari.

/ / /

/ / /

/ / /

/ / /

/ / /

C.

PETITIONER HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 21 GOVERNING THE CONTENT AND FORM OF THE PETITION FOR WRIT OF CERTIORARI

Rule 21.5 states that:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Respondents' review of this Petition for Writ of Certiorari, as discussed above, reveals an extremely confusing and rambling discourse of 41 pages (also well outside the 30-page limit imposed by Rule 21.4) which is the absolute antithesis of the "accuracy, brevity, and clearness" required by Rule 21.5.

/ / /

Further, Petitioner seeks to have this Court again review and decide settled issues which have been laid to rest long ago. Petitioner's Petition is patently frivolous, as the same appellate issues he presented to the Ninth Circuit and which were ruled completely frivolous by that court are served up once again to this Court. The Petition, virtually nonsensical in the form of an abstract, rhetorical discourse, certainly does not give Respondent or the Court a "ready and adequate understanding of the points requiring consideration" (and in any event, there are none).

/ / /

/ / /

/ / /

CONCLUSION

The Supreme Court should not consider this Petition for Writ of Certiorari. The Petition was clearly filed well outside the time limits prescribed and mandated by Rule 20 and the Petition should be denied for that reason alone.

Should the Court decide to consider the Petition, Petitioner has not articulated any "special and important reasons" under Rule 17 which would warrant granting the Writ of Certiorari. Neither has Petitioner complied with the content and form requirements of Rule 21. For all of

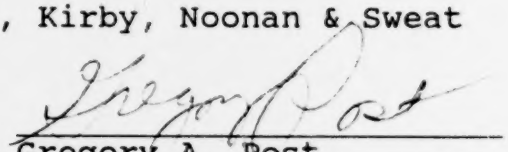
/ / /

/ / /

these reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Post, Kirby, Noonan & Sweat

By: 

Gregory A. Post
Attorneys for Respondent
Myron Klarfeld

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 25 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JEAN LEONARD HARRIS,	)	No. 86-6570
	)	
Plaintiff-Appellant,	)	D.C. No. CV-84-0767-T
	)	
v.	)	M E M O R A N D U M*
	)	
DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity; DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, individually and in his official capacity; DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity; COUNTY OF SAN DIEGO; RONALD HERPOLSHEIMER; JAMES LORENZ; MYRON KLARFELD,	)	
	)	
Defendants-Appellees.	)	

RECEIVED
JAN 27 1988
Post, Kirby, Noonan & Sweat

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, District Judge, Presiding
Argued and Submitted December 11, 1987
San Diego, California

Before: WALLACE, NORRIS, and THOMPSON, Circuit Judges

Harris appeals from the district court's dismissal of his 42 U.S.C. § 1983 claim that the defendants violated his Fourth Amendment rights as a result of a search of his office and residence and the seizure of documents. Applying the doctrine of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

APPENDIX "A"

collateral estopppel, the district court granted defendants' Motions for Summary Judgment. The court held in part that Harris was precluded from relitigating issues already raised in his state court criminal proceeding and that the Municipal Court had already ruled in that proceeding that the searches and seizure in question did not violate Harris' federal constitutional rights. We affirm. We also hold that the district court did not abuse its discretion when it refused to permit further discovery at the time of the summary judgment motions.

The legal determination that collateral estoppel was available to bar Harris' Section 1983 claim is reviewed de novo. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984). The district court's application of the doctrine, if available, is reviewed for abuse of discretion. Id.

In determining whether an issue has been fully and fairly litigated such that estoppel can apply, federal courts look first to the law of the state in question. Parsons Steel, Inc. v. First Alabama Bank, 106 S. Ct. 768, 772 (1986). Under California law, "any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action." Teitelbaum Furs, Inc. v. Dominion Insurance Co., 58 Cal. 2d 601, 607, 25 Cal. Reptr. 559, 375 P.2d 439 (1962).

The gravamen of Harris' section 1983 action was his claim that the defendants violated his Fourth Amendment rights by obtaining a search warrant and conducting a search and seizure of documents in his home and office without probable cause. Harris litigated precisely this Fourth Amendment issue before the Municipal Court in the context of his motions to suppress evidence and to traverse the search warrants. In ruling on these motions, the Municipal Court found that no federal constitutional violation occurred. When Harris pled guilty and waived his rights to appeal in the state criminal proceeding this ruling became final. People v. Charles, 171 Cal. App. 3d 552, 557 (1985). Because the Fourth Amendment issue underlying Harris' civil action was fully litigated in the state court criminal proceeding, collateral estoppel was available to bar Harris' Section 1983 claim and the district court did not abuse its discretion in dismissing Harris' complaint on that ground.

Appellant also argues that the district court abused its discretion in denying his motion to compel additional discovery before ruling on defendants' motions for summary judgment. Since none of the materials sought by appellant would have assisted him on the dispositive issue in the case, the district court did not abuse its discretion in denying appellant's motion to compel discovery.

With the exception of defendant Klarfeld, all of the defendants have requested attorneys' fees pursuant to 42 U.S.C. § 1988. Under that section, defendants in section 1983 actions are entitled to attorneys' fees when the plaintiff's action is frivolous. Roberts v. Spaulding, 783 F.2d 867, 874 (9th Cir.), cert. denied, 107 S. Ct. 399 (1986). Here the doctrine of collateral estoppel obviously barred Harris' claim. His arguments to the contrary are entirely without merit. We therefore award attorneys' fees to defendants Lorenz, Herpolsheimer, Samson, Shinnick, and Waight.

AFFIRMED.

NOT FOR PUBLICATION

FILED

APR 7 1988

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEAN LEONARD HARRIS,	)	No. 86-6570
	)	
Plaintiff-Appellant,	)	D.C. No. CV-84-0767-T
	)	
v.	)	O R D E R
	)	
DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity; DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, individually and in his official capacity; DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity; COUNTY OF SAN DIEGO; RONALD HERPOLSHEIMER; JAMES LORENZ; MYRON KLARFELD,	)	
	)	
Defendants-Appellees.	)	

Before: WALLACE, NORRIS, and THOMPSON, Circuit Judges

The panel, as constituted above, has unanimously voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is REJECTED.

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

July 13, 1988

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Jean L. Harris
16776 Bernardo Center Drive
Suite 110 B
San Diego, CA 92128

Re: Jean Leonard Harris v. Anthony Samson, Deputy District Attorney, et al.

Dear Mr. Harris:

Your petition for writ of certiorari typed on letter-sized paper was received July 12, 1988 and is returned. Such petition must be presented on paper which is 6 1/8 by 9 1/4 as required by Rule 33 of the Rules of this Court. The opinions and orders of the lower courts must also be retyped on paper which is 6 1/8 by 9 1/4 inches.

Furthermore, it would appear that this petition is out of time. Since judgement was entered by the Court of Appeals on January 25, 1988, the time to file this petition expired April 24, 1988. The petition for rehearing en banc order does not toll the time for filing a petition in this Court. Even if the April 7th order were controlling, the petition would have to have been received in this office on or before July 6, 1988 which was ninety days from the date of the order. Filing in this court is date of receipt by the Clerk, not the date of mailing. See Rule 28.2

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By

Francis J. Lorson
Chief Deputy Clerk

Enclosures

cc: Paul N. Bruce, Esq.
Michael L. Lipman, Esq.
Gregory Post, Esq

Cathy A. Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
(Your No. 86-6570)

APPENDIX "C"

Jean Leonard Harris
16776 Bernardo Center Drive
Suite 110 B
San Diego, California 92128
(619) 485-1177

August 8, 1988

Clerk of the Court
United States Court of Appeals
Ninth Circuit
Seventh and Mission Streets
Post Office Box 547
San Francisco, California 94101

Re: Harris v Samson et al
No 86-6570
D.C. No. CV 84-0767-T

Dear Clerk:

I am requesting that a clarification of the Order filed on April 7, 1988, be made. I have discussed this matter with Joe Williams of your office. The Petition For Rehearing En Banc, was docketed as a Petition for Rehearing together with a suggestion for hearing en banc. However, the Order only makes reference to a rejection of the suggestion for a rehearing en banc without reference to or a denial of the Petition for Rehearing. As I understand, the order normally reads that the Petition for Rehearing is denied and the suggestion for a rehearing en banc is rejected. I ask that the Order in this matter be clarified to read accordingly.

The reason for the request is as follows. The Clerk of the United States Supreme Court will accept the Petition for Writ of Certiorari within 90 days of denial of the Petition for Rehearing. Without mention within the order that the Petition for Rehearing was denied, the Clerk of the Supreme Court will not speculate as to the effect of the above order in this case. That is, the order must specifically mention that it is also a denial of the Petition for Rehearing. With this clarification, the Clerk of the Supreme Court will accept for filing the Petition for Writ of Certiorari already in his possession.

Respectfully Requested,

Jean Leonard Harris

cc Paul Bruce, esq.
Michael Lipman, esq.
Gregory Post, esq.

Francis J. Lorson
Chief Deputy Clerk
Supreme Court of the United States

APPENDIX "D"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 1988

CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

JEAN LEONARD HARRIS,	)	No. 86-6570
	)	
Plaintiff-Appellant,	)	D.C. No. CV-84-0767-T
	)	
v.	)	O R D E R
	)	
DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, individually and in his official capacity; DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, individually and in his official capacity; DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT, individually and in his official capacity; COUNTY OF SAN DIEGO; RONALD HERPOLSHEIMER; JAMES LORENZ; MYRON KLARFELD,	)	
	)	
Defendants-Appellees.	)	

Before: WALLACE, NORRIS, and THOMPSON, Circuit Judges

The request of appellant Jean Leonard Harris for clarification of the Court's order filed on April 7, 1988 is

DENIED.

APPENDIX "E"

PROOF OF SERVICE BY MAIL
(C.C.P. 1013a(3) and 2015.5)
(U. S. Supreme Court Rule 28)

Harris v. Klarfeld
Case No. 86-6570
D.C. No. CV-84-0767-T
Supreme Court No. 88-543

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 701 B Street, Suite 1400, San Diego, California 92101.

I served the following document(s): BRIEF FOR RESPONDENT MYRON KLARFELD IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

SEE ATTACHED SERVICE LIST

and I then sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice on November 1, 1988 at San Diego, California.

I am readily familiar with our business' practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the U. S. Postal Service on the same day that it is placed for mailing in the ordinary course of business.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this Proof of Service was executed on November 1, 1988.

Sharenda K. Gates

Sharenda K. Gates

SERVICE LIST

M. James Lorenz, Esq.
Lorenz, Alhadeff, Lundon & Oggel
101 West Broadway, Suite 1500
San Diego, California 92101

Morris G. Hill, Esq.
San Diego County
County Counsel's Office
1600 Pacific Highway, Room 355
San Diego, California 92101

Mr. Jean Leonard Harris
16776 Bernardo Center Drive
Suite 110-B
San Diego, California 92128

No. 88-543

FILED
NOV 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JEAN LEONARD HARRIS, Petitioner

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT COUNTY OF SAN DIEGO, RONALD HERPOLSHEIMER, JAMES LORENZ AND MYRON KLARFELD, Respondents

PETITION FOR WRIT OF CERTIORARI

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Reply to Respondent

JEAN LEONARD HARRIS, Pro Se
16776 Bernardo Center Dr. Suite 110B
San Diego, California 92128
(619)485 1177

No. 88-543

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JEAN LEONARD HARRIS, Petitioner

vs.

DEPUTY DISTRICT ATTORNEY ANTHONY SAMSON, DEPUTY DISTRICT ATTORNEY DUANE SHINNICK, DISTRICT ATTORNEY INVESTIGATOR HAROLD WAIGHT COUNTY OF SAN DIEGO, RONALD HERPOLSHEIMER, JAMES LORENZ AND MYRON KLARFELD, Respondents

PETITION FOR WRIT OF CERTIORARI

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Reply to Respondent

JEAN LEONARD HARRIS, Pro Se
16776 Bernardo Center Dr. Suite 110B
San Diego, California 92128
(619)485 1177

QUESTION PRESENTED

I.

ESTOPPEL SHOULD ONLY APPLY TO ACTUAL EVENTS AND CIRCUMSTANCES.

Respondent Klarfeld suggests that the issue presented by Petitioner is difficult to identify. Further, that whatever issue Petitioner may offer has been deemed to be without merit. Finally, Respondent addressed, in the main, procedure issues resolved when the Clerk of the Supreme Court accepted this Petition as filed.

Petitioner will not address the procedure questions raised by Respondent for reason just stated and the further note that the Brief in Response is itself untimely for reasons similar to those addressed in opposition to the Petition.

The issue presented within this

Petition is simple: to what does estoppel apply. Estoppel should apply only to the real facts established between the parties. The parties should be estopped to deny what really happened- not a fictitious recreation. What really happened between Petitioner and Respondents was the evidence in the record supporting the ordered traversal of the search warrant and the refusal of the court to reconsider that decision.

Respondent's brief suggests that the Municipal Court Judge (Amos) "ultimately" found that Petitioner's Fourth Amendment rights were not violated. Exhibit "C" and "E" to the Petition clearly show that Judge Amos made one order finding Respondents without probable cause to enter Petitioner's office and home and, thereafter, two separate findings relative to the exclusionary rule. The issue is, to which facts or circumstances

is Petitioner, or Respondents, collaterally estopped to deny.

First, Judge Amos made an order granting the motion to traverse and refused to change that order. This order was based upon the true facts that Respondents fabricated the criminal allegation against Petitioner, in the affidavit supporting the search warrant, and kept from Judge Amos, the issuing magistrate, material facts going to prejudice and bias of Respondents against Petitioner. See exhibit "C" to Petition. The only paragraph of the affidavit that supported probable cause for issuance of the warrant was found to be a fabrication. See pgs 307,317,318 of Exhibit "C". That evidence is the true event between Petitioner and Respondents and upon which this 1983 action rests. After this conclusion, Judge Amos then attempted to apply the Federal

Exclusionary rule.

When Judge Amos applied the exclusionary rule, he did so to only two of the three counts. He "supposed" that the criminal charges were not fabricated. Then he suggested "what if" the material omissions had not occurred. On this artificial creation of circumstance, he then created probable cause to admit evidence as to two counts. Note, as to the third count he continued with exclusion but did admit some evidence under the inevitable discovery rule. The inevitable discovery rule is also a judicial creation of circumstance but, unlike the federal exclusionary rule, does not turn on a finding of probable cause. However, the court never uses the inevitable discovery rule without first finding Respondents acted without probable cause.

Of the three conclusions reached by

Judge Amos, why must the estoppel doctrine work against Petitioner on the second of three decisions of Judge Amos? Is it because the second decision was after the first? But there was a third decision after the second and it was a confirmation of Respondent's lack of probable cause. The order of the decisions cannot be the basis of applying estoppel as against Petitioner- or Respondents. A more logical criteria is needed. That criteria should be that Petitioner should be estopped to deny only the true facts and circumstances between he and Respondents.

Petitioner can think on no other circumstance where a party to a judicial proceeding is bound to anything other than the true facts. At the preliminary hearing, Petitioner's attorney fully litigated the true event. Petitioner, the victim of the unconstitutional

conduct, thereby preserved his record for a subsequent civil rights action. Thereafter, Petitioner should not be divested of his civil rights cause of action because of the Municipal Court's erroneous interpretation of the federal exclusionary rule and the court's invention of the events. The preliminary hearing is unique in its opportunity to fictionalize the events between the parties.

"Goldilocks" is estopped to deny that she burgled the house of the "Three Bears". She trespassed, committed malicious mischief within, converted personal property, and was a petty thief. The only thing missing for civil rights liability is state action. Notwithstanding, she should not escape liability simply because the story teller obscures the truth with a fable.

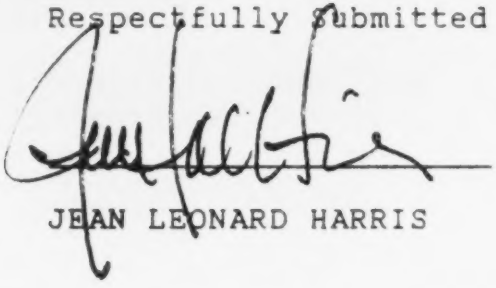
Further, the fable created through

the exclusionary rule should not bar other causes fairly read into the complaint.

CONCLUSION

The merit of this Petition turns, first, on whether the issue is identified. The identity of the issue is clearly stated. Next, is the issue presented of significance relative to civil rights actions. Civil rights actions will certainly become a dead letter if the victim is divested of his claim because of the fictions created to "get the evidence in".

Respectfully submitted



JEAN LEONARD HARRIS

CERTIFICATE OF SERVICE

On November 9, 1988, I served the attached **Brief in Reply to Respondent** re WRIT OF CERTIORARI, on the interested parties in this action, by mailing a coy to the following:

Morris G. Hill, Esq.
County Counsel Office
1600 Pacific Highway, Rm 355
San Diego, California 92101-2467

James Lorenz
Lorenz, Alhadeff and Lundin
101 West Broadway, Ste 1500
San Diego, California 92101

Gregory Post, Esq.
701 B Street, Ste 1400
San Diego, California 92101

Executed this 9th day of November, 1988, at Rancho Mirage, California.

Jean Leonard Harris

16776 Bernardo Center Dr. Ste 110B
San Diego, California, 92128